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No. 16,317 ✓

VOL. 3104

In the
United States Court of Appeals

For the Ninth Circuit

SEE ALSO

3103

GEORGE J. TOWLE and FRED GEORGE, in-
dividually and as copartners doing
business as TOWLE-GEORGE TURKEY LOG
COMPANY, also known as TOWLE FOOD
PRODUCTS Co., a partnership,

Appellants,

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a
corporation,

Appellee.

Appellee's Answering Brief

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No. 16,317

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE J. TOWLE and FRED GEORGE, individually and as copartners doing business as TOWLE-GEORGE TURKEY LOG COMPANY, also known as TOWLE FOOD PRODUCTS Co., a partnership,

Appellants,

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a corporation,

Appellee.

Appellee's Answering Brief

Appellants' Opening Brief (pp. 1-2) characterizes the action as one in which appellants sought to recover losses resulting from appellee's "extension of credit in violation of an agency agreement existing between the parties." This statement is correct only in so far as it means that appellants in their complaint and at the trial were claiming that appellee, Norbest Turkey Growers Association (hereinafter called "Norbest"), violated an agency which resulted from specific instructions to ship material only on a sight draft bill of lading basis as distinguished from invoicing

on an open account basis. The metamorphosis which has taken place in the instant case will be considered at length in appellee's Statement of the Case. As is the case in Appellants' Opening Brief, all references to the record will be "(R.)."

JURISDICTION

Appellee agrees with the statement of jurisdiction of both the trial court and this Court as found on page 2 of Appellants' Opening Brief.

STATEMENT OF THE CASE

Questions Presented.

The basic questions in the case are entirely factual. These are: "What agency was created and what instructions or authority were given to Norbest by appellants in creating the agency, and did Norbest comply with those instructions and the terms of the agency?"

Summary.

The very obvious moral of this case is that it does not pay to do a favor for a friend. A very short summary of the facts at the outset, before considering them in detail, will be helpful.

On or about May 25, 1954, appellants, a co-partnership, agreed in writing to buy 190,000 pounds of a product known as turkey logs from appellee, Norbest, on or before August 1, 1954, at an ultimate price of 95¢ a pound. Thereafter, appellants entered into an agreement to sell these same turkey logs to Towle Food Products Inc., also known as Turkey Log Corporation of Illinois (hereinafter called "the Illinois corporation"), on or before August 1, 1954, for \$1.05 a pound. These were entirely separate agreements.

From time to time appellants did withdraw some of these turkey logs from storage for which they were invoiced by

Norbest at 95¢. Appellants then ordered the transfer of these same turkey logs to the Illinois corporation and in turn invoiced the Illinois corporation directly for their own account at \$1.05.

On July 22, 1954, one of the appellants first wrote Norbest to the effect that he was going to Europe on a vacation trip with his wife and asked as a favor if Norbest would be willing to "invoice" (Pl. Ex. 8, R. 123-4) the Illinois corporation directly while he was gone rather than having the Illinois corporation pay him and then have him pay Norbest. Since the Illinois corporation was paying appellants \$1.05 a pound for the product and appellants were only paying Norbest an ultimate 95¢ a pound, appellant also asked if Norbest would be willing to credit the difference at the proper time and pay over the credits whenever they accumulated to appellants' bank.

Norbest was to receive nothing for extending this favor, but it nevertheless, after some correspondence, wrote appellants on August 6, 1954, indicating it would be glad to "bill" the Illinois corporation at \$1.05 a pound and credit appellants with the difference (Pl. Ex. 17, R. 133-4). At a meeting held in Salt Lake City on August 10, 1954, between Norbest, appellants, and the Illinois corporation it was orally agreed that Norbest would invoice the Illinois corporation directly at \$1.05 a pound, that transfers of the product would be made directly by Norbest to the Illinois corporation, and that after Norbest had been paid in full at its price of 95¢ a pound, any credits resulting from the difference in price between 95¢ and \$1.05 would be paid over to appellants (Finding VIII, R. 38-9—this portion of the finding is not controverted and is not assigned as error). On August 12, 1954, Mr. Towle, one of appellants, wrote his office and advised that the Illinois corporation had agreed to be "invoiced" (Def. Ex. A, R. 146).

Norbest followed these instructions to the letter; however, the Illinois corporation refused to pay Norbest at the \$1.05 price and paid only at the 95¢ price because of legal problems between appellants and the Illinois corporation (Pl. Ex. 15, R. 137-8) with the result that no credits accrued to appellants.

When appellant Towle returned from Europe in October 1954, he found this out and tried to get the Illinois corporation to do something about it, with no success. He also saw Norbest. He mentioned nothing to either Norbest or the Illinois corporation about any failure to use sight draft bills of lading.

Approximately one year later, and for the first time, appellants took the position with Norbest that it shouldn't have invoiced the Illinois corporation because it had been instructed to ship everything sight draft bill of lading and that as a result Norbest was liable for the 10¢ a pound differential which it had not collected. It is rather obvious that if Norbest had not undertaken to perform this favor for appellants, this lawsuit would never have resulted.

The case thus began and was tried as one in which appellants charged that they had created Norbest their agent with specific instructions to ship material on a sight draft bill of lading basis only and that appellee had violated those instructions by invoicing and shipping on open account (Complaint, para. 13, R. 7; para. 15, R. 7; para. 17, R. 8; para. 22, R. 10; para. 23, R. 10; para. 31, R. 12-13; para. 32, R. 13; para. 33, R. 13). Appellants now on appeal, having failed to satisfy the trial court that there were any such instructions to ship sight draft only, have decided to retreat from that position. They now say that even though there were no such instructions there was also *no agreement* or authorization to invoice on open

account (this last is completely contrary to Findings VII and VIII, R. 37-9, which are fully supported by the evidence), that it was therefore appellee's obligation to establish a right to invoice, and that it failed to sustain that burden (Appellants' Brief, pp. 32-51). Another assumption they make is that the agency which was created was to carry out or perform existing contracts which the partnership had with the Illinois corporation (Appellants' Brief, pp. 57-61).

All of these contentions beg the question. The fact which appellants ignore, which disposes of the whole case, is that it was up to appellants, who pleaded the agency in the first place, to establish its existence and its terms. The trial court, acting as the finder of disputed facts, found that the agency which was created was one under which it was *agreed* that Norbest was to ship "directly to" Illinois, "to invoice the Illinois corporation directly at \$1.05 per pound," and to receive funds from the Illinois corporation (Finding VIII, R. 38-9). It is undisputed that Norbest did just this. That establishes the terms of the agency and ends the case. There is no need to speculate as to what the rules would be or who would have the burden of proof in case of a different type or kind of agency. We are concerned with the agency established by agreement of the parties in this case.

The Evidence.

In their attempt to bring themselves within a non-existent factual situation, appellants have ignored or misstated certain crucial facts and findings. Because of these misstatements, appellee deems it imperative, in fairness to this Court, to restate the facts of the case in accordance with the evidence and the findings of fact made by the trial court as it sees them, and thus dispose of certain

of the more glaring deficiencies in appellants' statement.

The parties to this case are co-partners Fred George and George Towle, variously referred to as Towle Food Products Co. and Towle Mfg. Co. (hereinafter referred to as "George" and "Towle"), who are the plaintiffs-appellants, and the Norbest Turkey Growers Association, which is defendant-appellee. The controversy concerns generally the purchase of a product known as turkey logs by Towle and George from Norbest and the sale of these same turkey logs by Towle and George to the Illinois corporation. A turkey log is a round cylinder of pressed boned turkey meat generally prepared for institutional use (R. 52).

On May 25, 1954, Towle, acting for and on behalf of the partnership, agreed in writing (Pl. Ex. 4, R. 14-16, 117) to purchase approximately 190,000 pounds of turkey logs from Norbest in lots of 10,000 pounds or more at a price of 99¢ per pound, to be paid upon taking delivery, and to purchase and pay for the entire amount of these turkey logs on or before August 1, 1954. After 100,000 pounds had been delivered and paid for, the partnership was to receive a credit of 4¢ per pound on these 100,000 pounds; and the balance of the approximately 190,000 pounds was to be paid for at 95¢ per pound. Up to August 10, 1954, Norbest shipped to or for the account of the partnership entirely on open account and invoiced the partnership when it placed an order for turkey logs. The partnership would advise Norbest of orders it had received from the Illinois corporation and request shipment (R. 57). Norbest then invoiced the partnership. Norbest never received cash from or for the account of appellants before the turkey logs were in fact shipped or delivered, except only in instances in which the Illinois corporation specifically requested the partnership to make sight draft shipment to its customer and the partnership in turn specifically requested Norbest to handle it on this basis (R. 60-61).

On June 10, 1954, the partnership agreed in writing (Pl. Ex. 6, R. 16-22, 121) with the Illinois corporation to sell to it, f.o.b. Chicago, all of the turkey logs which the partnership was purchasing from Norbest, in minimum quantities of 10,000 pounds at a price of \$1.05 per pound to be paid at the time of taking delivery, with the entire purchase price payable on or before August 1, 1954. Up to August 10, 1954, the partnership handled its entire relationship with the Illinois corporation on an open account basis and invoiced the Illinois corporation (R. 60). The partnership never received cash from the Illinois corporation nor was cash paid to Norbest for the account of the partnership for such turkey logs prior to or upon delivery except in instances in which the Illinois corporation specifically requested a sight draft shipment to a third-party customer (R. 60-61).

The partnership was in fact substantially in default in its payments to Norbest in late July when Mr. Towle wanted to take his European vacation (Pl. Ex. 12, R. 133). The Illinois corporation was also in default to the partnership.

On or about July 22, 1954, Towle, on behalf of the partnership, wrote a letter to Norbest (Pl. Ex. 8, R. 123-4). This initiated a series of correspondence between the parties culminating in a meeting in Salt Lake City on August 9 and 10, 1954. It is particularly in connection with this correspondence and the Salt Lake City meeting that appellants lose contact with the evidence and uncontested findings of fact.

In this first letter of July 22, Towle *inquired* whether Norbest would be willing to make shipments for the account of the partnership of the balance of the turkey logs directly to the Illinois corporation on the basis of orders issued directly to Norbest by the Illinois corporation, to invoice the Illinois corporation on the basis of \$1.05 per pound,

f.o.b. Chicago, with payments to be made directly to Norbest by the Illinois corporation, and Norbest to credit the partnership's account on the basis of 99¢ per pound and with the 95¢ per pound retroactive figure to be credited at the proper time. He asked for "immediate consideration of this suggestion" (Pl. Ex. 8, R. 123-124). This *inquiry* was made by Towle because he was leaving for Europe and it would be more convenient for him to have the matter handled in this way and have the Illinois corporation pay Norbest directly during his absence rather than to have the Illinois corporation pay the partnership on the basis of invoices issued by the partnership and the partnership pay Norbest on the basis of invoices issued by Norbest to the partnership (Pl. Ex. 8, R. 123-4). These facts are all found in Finding of Fact VI (R. 36-7) and have not been specified in appellants' Statement of Points as error.

Appellants assert on page 7 of their opening brief that Towle *instructed* Norbest to do certain things in his letter of July 22, 1954 (Pl. Ex. 8, R. 123-4). In fact, that letter contains no *instructions* to Norbest. It is undisputed that up to the time that letter was sent, Norbest was not and had not been the partnership's agent and owed no duty, contractual or otherwise, to the partnership, except to sell to it the turkey logs in accordance with the terms of the contract between Towle and Norbest. Consequently, neither the partnership nor Towle had any power to issue such instructions to Norbest. Moreover, it is patent from the words of the letter itself that it was a letter of inquiry, not a letter of instructions. Towle said in the concluding paragraph of his letter:

"Will appreciate your immediate consideration of this suggestion so that I can make my necessary plans."
(Pl. Ex. 8, R. 124)

Appellants have a great deal of trouble regaining contact with reality, for on page 8 of their opening brief they state that Norbest, in a letter dated July 30, 1954, (Pl. Ex. 9, R. 125-6) consented to and accepted Towle's proposals including sight draft bill of lading.

This letter of July 30, 1954, was concerned with an entirely different subject and did not even mention the 95¢ price charged by Norbest to the partnership or the \$1.05 price which Towle had mentioned and requested in his letter of July 22 that Norbest bill the Illinois Corporation on behalf of the partnership. In fact, the letter repudiates any such agency and states that if all turkey logs are not billed by "the tenth, that they be transferred over and we will bill them to you." (Pl. Ex. 9, R. 125-126). It further refers to a phone call of the same date and discusses prices of pending shipments to customers of the Illinois corporation. (See shipment to Wichita, Kansas, of 600 cartons at \$1.18 a pound—Pl. Ex. 16, R. 139-140—made on August 3, 1954; Pl. Ex. 18, R. 144-145).

The trial court expressly found that it was not until August 6, 1954, that Norbest *for the first time* advised appellants that *it would be willing, on behalf of the partnership, to make shipments of the balance of the turkey logs to the Illinois corporation directly, to bill the Illinois corporation at \$1.05 per pound, and to credit the partnership's account with the difference* (Finding VII, R. 37-8).

The trial court also found that appellants did not, prior to August 6, 1954, *or at any other time*, give instructions to Norbest that shipments of turkey logs to the Illinois corporation should be made only on a sight draft basis payable to Norbest.

It should be stressed at this point and borne in mind throughout that appellant Towle testified without equivocation that there was *no* written agreement between the

partnership and Norbest with regard to sight draft billing (R. 79-80). Yet appellants assert on page 8 and throughout their brief that Towle's letters of July 30 and August 3, 1954, and Beyers' letters of July 30 and August 6, 1954, constitute such an agreement. Apparently consistency has, at long last, ceased to be a virtue.¹

Although Towle had not heard from Norbest concerning its willingness to act as the partnership's agent, he wrote a letter to the Illinois corporation on August 3, 1954 (Pl. Ex. 10, R. 127-129). In this letter he said he had "asked Norbest to *bill* you direct for me". (Emphasis added.) He then concluded by saying that if "there is any possibility that you will not be able to pick up the *invoices* for the balance of the turkey logs, that you notify Norbest so

1. On pages 7 and 8 of their opening brief, appellants make some statements which infer an agreement to ship sight draft to the Illinois corporation. They state that Norbest has conceded that it failed to follow instructions and ship on a sight draft basis and that it has admitted in its answer that a particular shipment was to be on sight draft bill of lading basis and was later billed to the Illinois corporation on a different basis. (Complaint, para. 12-13, R. 7; Answer, para. 1, R. 22; para. 4, R. 23.) Since appellants press this argument throughout their opening brief, it will be considered here. As the record indicates, the shipment referred to on pages 7 and 8 of Appellants' Opening Brief (Invoice T-855) was a shipment made on August 3, 1954, to three buyers from the Illinois corporation. The Illinois corporation directed, through Towle, that this shipment be shipped sight draft bill of lading or C.O.D., and shipment *was* made by sight draft. However, one of the consignees refused to accept delivery; and after payment was refused by the consignee, this portion of the shipment was transferred on August 16 to the account of the Illinois corporation and placed in storage with the Kansas Cold Storage Co., Wichita, Kansas (Pl. Ex. 16, R. 139-140; Pl. Ex. 18, R. 144-5). Appellant George himself admitted that the partnership had never, prior to August 10, 1954, sent or used the sight draft or sight draft bill of lading in its dealings with the Illinois corporation, except in those instances in which the Illinois corporation had requested sight draft shipments to *its* customers, including this shipment to Wichita (R. 61). Appellants either cannot or will not recognize that this transaction is totally irrelevant to the issues now before this Court.

that they would be in a position to dispose of any surplus inventory". (Emphasis added.)

Up to this point then, not a word mentioned of any sight draft bill of lading to Norbest, and now a letter to the Illinois corporation saying they are going to be *invoiced*! And if there is any lingering doubt, Mr. Towle's next letter to Norbest dispels it. He also wrote them on August 3 (Pl. Ex. 11, R. 130-132). He said that he had notified the Illinois corporation "that the *invoicing* would come from your office on the basis of \$1.05 a pound with payment to be made to Norbest * * *. I also suggested that in the outside possibility that he would not be in a position to pick up the balance * * * to advise you * * * so that you could dispose of them * * *. *I don't think there is a possibility of this occurring.*" Then, after apologizing for running off on vacation and putting the burden of "*invoicing and collecting*" on Norbest, Mr. Towle sugarcoated the pill by giving some friendly advice to the effect that "As for future deliveries, *I think* that the sight draft payable to Norbest is the only solution to insure prompt payment". (Emphasis added.)

This is the only place in the whole series of correspondence where appellants ever used the words "sight draft" to Norbest or the Illinois corporation. It is used here only in the subjective sense of "I think", after he said he had told the Illinois corporation they are going to be *invoiced*. It is not a direction or even a request. It could not be either one since up to this point Norbest had not agreed to do anything for appellants.

It was not until August 6, 1954, that Mr. Beyers of Norbest indicated that he would be willing to do anything in accordance with the suggestions made up to this point by appellants, and he did not agree to any sight draft billing to the Illinois corporation. He said (Pl. Ex. 12, R. 133-4):

"I have your letter of August 3rd in which you request that we *bill* the organization in Chicago at \$1.05 a pound and credit Towle Manufacturing Company with the difference. We will be glad to do this." (Emphasis added.)

Thus, the "undisputed documentary evidence" referred to on page 9 of Appellants' Opening Brief, and again on page 30 as being the evidence on which the agency relationship principally rested, not only fails to establish an agency relationship in which Norbest agreed to ship on a sight draft bill of lading basis, but fully supports the findings that no such instructions were given on or prior to August 6, 1954. This documentary evidence also established that as of August 6, 1954, appellants had requested Norbest and Norbest had agreed only to *invoice or bill* the Illinois corporation for the partnership.

Beyers of Norbest also said in his letter of August 6, 1954, to Towle:

"It appears we extended the time until August 10th for the billing to be complete and I am hopeful it can be worked out on this basis. In the event that we are unable to get the 190,000 pounds of logs billed and paid for within the allotted time, we see no alternative for us but to request the cancellation of the agreement which we made and which you are a party to."

This statement of a possible cancellation of the agreement led to a meeting which was arranged among Towle and George, Norbest, and a representative of the Illinois corporation (Pl. Ex. 10, R. 127-9). This meeting was held in Salt Lake City, Utah, on August 9 and 10, 1954, (R. 52-55, 89-92) and it was at this meeting that the agreements among the parties were confirmed. At that meeting it was orally agreed among appellants, Norbest, and the Illinois corporation that a transfer of the remaining turkey logs would be made by Norbest directly to the Illinois corpora-

tion on the basis of orders issued by the Illinois corporation; that Norbest would *invoice* the Illinois corporation directly for these orders at \$1.05 per pound (R. 78); that the Illinois corporation would pay in full for all of said turkey logs by August 25, 1954; and that after all of the approximately 190,000 pounds had been sold and Norbest had been paid for them in full, any credit which was then accrued to the partnership would be paid by Norbest to the partnership (Pl. Ex. 13, R. 135-6; Pl. Ex. 14, R. 136-7; Def. Ex. A, R. 145-6; R. 90-92; R. 70-80). All these facts are found in Finding VIII (R. 38-9) and again appellants do not specify in their statement of points any error in these findings. Nor do they argue that these facts are not supported by substantial evidence.

The facts are in direct dispute as to whether at these meetings Norbest said anything to the Illinois corporation about sight draft billing. However it is undisputed that at no time during the meetings did George or anyone else instruct Norbest to ship to the Illinois corporation on a sight draft bill of lading basis only (R. 91). Appellants do not even argue that any such instructions were given at this time to Norbest or that it was brought to their attention (Testimony of George, R. 66). It is inconceivable that, if any agency requiring sight draft billing was intended, it would not have been specifically brought to Norbest's attention at this time in view of all of the previous correspondence which had referred to invoicing only. The fact is that this was not intended and invoicing on open account was agreed upon. The nearly contemporaneous letter written by Mr. Towle to his office on August 12 establishes this. In this he said (Def. Ex. A, R. 145-6):

"T.F.P. Inc. have also agreed to be *invoiced* and pay for some 80,000 lbs. *and* pay up by August 20. We should receive our check from Norbest shortly after * * *." (Emphasis added.)

No mention in this letter of any sight draft. It refers to invoicing *and* paying up by a later date. To remove any doubt, Mr. Towle testified that as to any agreement for sight draft billing by Norbest,

“I don’t recall there was anything oral, and I am—I know there is no written agreement. I am sure.”
(R. 79)

Thereafter Norbest, as agent for the partnership, and in accordance with its agreement with and instructions from the partnership and appellants, made shipments directly to the Illinois corporation on or before August 25, 1954, (Pl. Ex. 16-A, R. 140-1) of the entire balance of the approximately 190,000 pounds of turkey logs and transmitted invoices or sight drafts directly to the Illinois corporation in connection with these shipments at \$1.05 per pound. All of these shipments or transfers were made in approximately the same manner as and followed approximately the same practice as appellants had followed in making previous shipments or transfers from appellants to the Illinois corporation.

Under the terms of appellants’ contract with Norbest, they were required to make payment in full by August 1, 1954; this had been extended by Norbest to August 10, 1954; payment had not been made at the time of the meeting of August 9-10; therefore the *entire* amount of approximately \$187,000 for the approximately 190,000 pounds of turkey logs purchased by appellants from Norbest was at that time due, owing, and payable (Pl. Ex. 16-A, R. 140-142; R. 59; Pl. Ex. 4, R. 117, 14-16). However, at this meeting Norbest agreed to extend this payment date to August 25th (Pl. Ex. 13, R. 135-6), and it was also agreed that the partnership would receive no credit until Norbest had been paid in full (Pl. Ex. 14, R. 136-7).

As Norbest received money from the Illinois corporation on account of such transfers, it credited the amounts against the total amount owing to Norbest by appellants and the partnership for the turkey logs (Pl. Ex. 16-A, R. 140-2). The Illinois corporation refused, however, to pay Norbest the amount for which the Illinois corporation had been invoiced at \$1.05, because of "legal problems involved" between appellants and the Illinois corporation and paid instead to Norbest an amount sufficient only to equal the net amount due Norbest from appellants at the rate of 95¢ per pound (Pl. Ex. 16-A, R. 140-2; Pl. Ex. 15, R. 137-8). There was nothing left in Norbest's hands to pay over to appellants. For these reasons the complicated mathematics at pp. 11-13 of appellants' brief are meaningless.

When Towle returned from Europe, he and Herbert Beyers had another meeting in Salt Lake City on October 26 or 27, 1954 (R. 81; R. 92). At that meeting Towle and Beyers discussed the fact that the full sale price had not been paid by the Illinois corporation. Towle however said absolutely nothing to Beyers relative to Norbest's alleged failure to bill by sight draft bill of lading or the alleged unauthorized extension of credit by Norbest (R. 92-4; R. 81-3).

In November, 1954, Towle met with an officer of the Illinois corporation in Chicago, but Towle did not recall discussing with him the matter of sight draft bills of lading or anything of that sort (R. 83-4).

As Towle stated, the matter of some responsibility on the part of Norbest was, as far as he individually was concerned, an afterthought after he had found that he could not collect the sum of money allegedly owing from the Illinois corporation (R. 84-8). In fact, the first time that Norbest became aware that Towle or the partnership was making a claim against it was nearly a year later, in September 1955 (R. 94).

The instant litigation is the brainchild of Towle's abortive afterthought. This brainchild miscarried in the trial court. The issues raised in Appellants' Opening Brief are, as they were in the trial court, almost exclusively factual.

While it is only natural that appellants are disappointed by their failure to recover, it is somewhat unnatural that they should argue in a vacuum. If they are to be fair-minded at all, they cannot argue that the findings are not supported by substantial evidence and they make no serious attempt to do so. Instead, they wishfully attempt to argue about types of agencies which do not exist here. In the present state of this record the findings of the trial court are not open to question and the trial court's determination of the factual issue adverse to appellants, as outlined above, should be accepted as binding and conclusive on this appeal.

APPELLEE'S ARGUMENT**I.****The Findings of Fact as Found by the Trial Court Are Sustained by Substantial Evidence and Dispose of this Action.****A. WHAT WAS THE SCOPE OF THE AGENCY CREATED BETWEEN NORBEST AND APPELLANTS?**

Appellee has no quarrel with the application of California law to the instant case.

Likewise appellee has no quarrel with the general proposition that Norbest did in fact act as the agent of appellants. This statement by itself, however, means very little, for the crucial questions which still must be answered are:

1. What was the scope of the agency created?
 - a. What was Norbest instructed to do?
 - b. What did Norbest agree to do?
2. What did Norbest actually do?

It is in regard to these four crucial questions that appellants' argument and their opening brief run awry. Out of sheer necessity appellants have created or assumed a phantom agency relationship which never in fact existed. The simple and complete answer to appellants' argument is that the agency or agencies which they have created in their opening brief exist only in their opening brief. They have no existence in fact.

Much has been said in Appellants' Opening Brief concerning the duties owed by an agent to his principal. Nothing has been said by appellants respecting the duty owed by the principal to his agent. This omission is understandable, however, for even a partial exposition of the duties of the principal to his agent is a near fatal blow to appellants' case and the phantom agency created by them.

The duty of the principal is partially stated in Mechem, *Agency* (2d ed., 1914) in Section 792 as follows:

"It is the duty of the principal, if he desires an authority to be executed in a particular manner, to make his terms so clear and unambiguous that they cannot reasonably be misconstrued. *If he does this*, it is the agent's duty to the principal to execute the authority strictly and faithfully; * * *." (Emphasis added.)

In the next section of the same work the author states the effect of a failure on the part of the principal to make his instructions so clear and unambiguous that they cannot be reasonably misconstrued. In Section 793 Mechem states:

"§ 793. *When ambiguous, construction adopted in good faith, sufficient.*—But if, on the other hand, the authority be couched in such uncertain terms as to be reasonably susceptible of two different meanings, and the agent in good faith and without negligence adopts one of them, the principal cannot be heard to assert, either as against the agent or against third persons who have, in like good faith and without negligence, relied upon the same construction, that he intended the authority to be executed in accordance with the other interpretation. If in such a case, the agent exercises his best judgment and an honest discretion, he fulfills his duty, and though a loss ensues, it cannot be cast upon the agent.

"An instrument conferring authority is generally, it is said, to be construed by those having occasion to act in reference to it, 'as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical and apparently employed in a popular sense.'"

This rule was adopted by the *Restatement of the Law of Agency*, and appears in the *Restatement of Agency* 2d as Sections 26 and 33, which provide as follows:

“§ 26. Creation of Authority; General Rule

“Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, *reasonably interpreted*, causes the agent to believe that the principal desires him so to act on the principal’s account.”

* * * * *

“§ 33. General Principle of Interpretation

“An agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal’s manifestations and the facts as he knows or should know them at the time he acts.” (Emphasis added.)

Finally the same rule has been codified in the California Civil Code as Sections 2315 and 2316, which provide as follows:

“§ 2315. Measure of agent’s authority. An agent has such authority as the principal, actually or ostensibly, confers upon him.”

“§ 2316. Actual authority, what. Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.”

The sum total of this authority is this: A principal must make his instructions to his agent clear and unambiguous. If he fails to do so, and the agent acts reasonably in light of what he honestly thought the principal meant, he has actual authority to act in that way and will not be liable to the principal for a breach of duty. But most importantly—it is a pure question of fact as to what those instructions were.

Bearing these principles in mind, what was the scope of the agency created between Norbest and appellants?

1. The Agency Did Not Include Any Requirement of Sight Draft Billing.

Considering first the allegations of appellants' complaint, the question presented is whether Norbest was appellants' agent to ship to the Illinois corporation on a sight draft bill of lading basis only. It is almost undisputed that no such instructions were in fact given to Norbest. Appellants have practically abandoned this argument in their opening brief, the trial court has expressly found that no such instruction was given, and the evidence abundantly supports this finding.

The correspondence up to the August 10 meeting in Salt Lake City is replete with references to billing or invoicing on open account. Towle testified that there was no written agreement and that he did not recall any oral agreement for sight draft billing (R. 79). George testified that at the meeting on August 10, 1954, in Salt Lake City he did not say anything to Herbert Beyers about shipping on a sight draft bill of lading basis (R. 66). Beyers testified that no such instructions were given to him at that meeting by anyone (R. 91).

Beyers' letter to Adams of the Illinois corporation dated August 10, 1954, the same date as the one on which the meeting was held at which the agency relationship was created, states that it was agreed that the turkey logs on hand in the warehouses would be re-labeled and paid for by the Illinois corporation by August 20, 1954, except tonnage in Los Angeles to be paid for by August 25, 1954 (Pl. Ex. 13, R. 135-6).

Towle's understanding, as evidenced by a letter written to his accountant from New York City on August 12, 1954, was substantially in accord, and specifically to the effect that the Illinois corporation was to be invoiced (Def. Ex. A, R. 145-6).

Towle made no mention of any failure to bill sight draft when he was discussing the refusal of the Illinois corporation to pay the full amount of the invoice with Norbest and the Illinois corporation on his return from Europe (R. 82, 83).

The only shred of evidence opposed to this mass of evidence is Towle's lonely "I think * * *" statement contained in his letter of August 3, 1954 (Pl. Ex. 11, R. 130-2). Towle said only:

"As for future deliveries, *I think* that the sight draft payable to Norbest is the only solution to insure prompt payment." (Emphasis added.)

This statement was both equivocal and ambiguous. All Towle's statement could possibly indicate is that at most there was a preliminary mention of such an arrangement and not a clear cut understanding or direction that this was the way the shipments were to be handled. Towle did not say "It must be done this way." He said only "I think * * *", and Norbest did not agree to do it this way.

This is precisely the kind of ambiguous and equivocal statement which Mechem and the other authorities must have had in mind when they formulated the rules expressed earlier.

Viewing this evidence in its entirety, the trial court found that the agency did not include any instructions to Norbest to ship on a sight draft bill of lading basis only. The foregoing evidence clearly sustains this finding. So far as this Court is concerned the conflict, if any exists, was for the trial court to determine.

What then was Norbest authorized and instructed to do?

2. The Agency Provided for Invoicing on Open Account.

This is summarized in Findings VI, VII, and VIII (R. 36-39). These findings, insofar as they relate to an express

agreement, are based upon all the evidence referred to supra at pp. 5 to 16 of this brief, including the correspondence authored entirely by appellants which refers to "invoicing" of the Illinois corporation, the past practices of the parties, Towle's contemporaneous letter reciting the agreement for invoicing reached at the August 10 meeting, and the oral testimony.

These findings state that it was agreed that a transfer of the turkey logs then remaining in the warehouse would immediately be made by Norbest to the Illinois corporation and would be re-labeled in the name of the Illinois corporation (Pl. Ex. 13, R. 135-6). It was further agreed that transfer or shipment of these turkey logs would be made by Norbest directly to the Illinois corporation on the basis of orders issued by the Illinois corporation, and that Norbest would *invoice* the Illinois corporation for them at \$1.05 per pound (Def. Ex. A, R. 145-6; Pl. Ex. 8, R. 123-4; Pl. Ex. 10, R. 127-9; Pl. Ex. 11, R. 130-2; Pl. Ex. 12, R. 133-4). It was also agreed that the Illinois corporation would pay in full for these turkey logs by August 25, 1954 (Pl. Ex. 13, R. 135-6). Finally it was agreed that after all of the approximately 190,000 pounds of turkey logs had been sold *and* Norbest had been paid in full, any credit which was then accrued to the partnership would be paid by Norbest to the partnership (Pl. Ex. 14, R. 136-7). This is all that was agreed among the parties. This is all that appellants instructed and authorized Norbest to do. This was therefore the scope of the agency.

Not only have appellants failed to designate the portions of the foregoing findings referred to as erroneous, they have not even argued or shown that they are not supported by substantial evidence. Even when appellants discuss these findings, they state only that they are in error in so

far as they hold that extension of credit was not a violation of specific instructions or the agency agreement. The finding of express authority to ship to the Illinois corporation and invoice on open account is amply supported by the record and therefore is binding on this Court. The statements at pp. 42, 45, and 57 of the opening brief that there is no finding and that the record nowhere shows that Norbest was expressly authorized to extend credit, i.e. ship and invoice on open account, are simply not true.

In addition, this authority to ship and invoice on open account is readily implied from evidence apart from the letters and statements of the parties.

On page 35 of their opening brief, appellants cite Section 65 of the *Restatement of the Law of Agency* for the proposition that *unless otherwise agreed* (it was so otherwise agreed), authority to sell includes only authority to sell for money or the customary medium of payment, payable at the time of the transfer of title. Appellants have, however, failed to include a very important comment on the section of the Restatement cited by them. In *Restatement of the Law of Agency* 2d, in comment "b." on section (1) of Section 65, the authors state:

"b. Although the specific terms of the authorization do not direct the receipt of anything other than money by the agent, the previous course of conduct by the principal or the customs of the particular locality with reference to the sale of the subject matter in question may indicate that the agent can properly receive something else for it. Authority to contract for payment by certified check or bank draft payable to the principal is frequently inferred. *Likewise, a sale on credit is frequently inferred from a previous course of dealing by the principal or others engaged in like business.* * * *" Restatement, *Agency* 2d at p. 178. (Emphasis added.)

In the instant case appellants had always shipped to and invoiced the Illinois corporation just as Norbest in fact did (R. 60). Norbest knew that this was the practice of the appellants. When Towle wrote his original letter on July 22, 1954 (Pl. Ex. 8, R. 123-124), he specifically inquired whether Norbest would be willing to *invoice* the Illinois corporation. The clear meaning of that letter and the subsequent correspondence was simply that appellants would be eliminated as a middle man and that the shipping and invoicing would go on exactly as before with that one exception. The trial court found (Finding IX, R. 39) that all of the shipments to the Illinois corporation were made in approximately the same manner and followed approximately the same practice as appellants had previously followed with regard to the Illinois corporation.

This is the type of previous conduct which the authors of the Restatement had in mind. Norbest did the same thing as appellants themselves had done in the past, acting pursuant to instructions from appellants to ship and to invoice. It is clear that even if Norbest was, as appellants contend and we emphatically deny, an agent to sell goods to the Illinois corporation it had implied authority to ship and to invoice as it in fact did.

The findings and conclusions of the trial court are also supported by the undisputed subsequent conduct of the parties to the agency agreement.

If we assume, as appellants contend, that the agency was not clearly spelled out so as to permit invoicing on open account, then the general rule of law, that if the agent's authorization is ambiguous the interpretation acted upon by the parties controls, would prevail. This rule is set forth in Restatement *Agency* 2d at Section 42 in the following language:

“If the authorization is ambiguous, the interpretation acted upon by the parties controls.” Restatement, *Agency* 2d at p. 133.

The Comment on this section states:

“a. The subsequent conduct of the parties to an agreement with reference to it is determinative, unless it is so clearly expressed in view of the attendant circumstances that it cannot reasonably be given the interpretation which the parties indicate by their conduct. If their subsequent conduct is contrary to the terms of the clearly expressed document, it may be found either that the document did not express the agreement, in which case the document can be reformed, or that the subsequent conduct indicates a new agreement as to the authority.”

In the instant case Towle’s “I think * * *” statement is at best equivocal and ambiguous. However, the undisputed conduct of both Norbest and appellants subsequent to August 10, 1954, was perfectly consistent (until September 1955) with the facts as found by the trial court. Norbest with the full knowledge of appellants shipped to and invoiced the Illinois corporation on an open account, collected funds from the Illinois corporation, and applied those funds to the partnership’s account with Norbest. Towle did not complain to Norbest when he returned from his European vacation in October 1954, about Norbest’s failure to ship on a sight draft bill of lading basis or about Norbest’s “extension of credit” to the Illinois corporation. Likewise Towle did not complain to the officer of the Illinois corporation on either count when Towle conferred with him in November 1954. It was only after Towle discovered that he could not collect the amount owing to the partnership from the Illinois corporation because of “legal problems in-

volved" that he sought to hold Norbest liable. Towle admitted that as far as he individually was concerned, the question of Norbest's liability was an *afterthought* (R. 84-8). In fact it was not until more than a year after the last shipment was made that Norbest first learned that appellants considered Norbest liable for the loss appellants had sustained.

It would be difficult to imagine a case which would fit more squarely within the rule announced in Section 42 of the *Restatement of Agency* 2d and Comment "a." thereto. The subsequent conduct of the parties to the agency agreement is undisputed and was consistent until September 1955. This conduct clearly supports the findings and conclusions of the trial court that Norbest was instructed to ship to and to invoice the Illinois corporation on an open account and that Norbest did not violate any of the terms of its agency.

B. APPELLANTS HAVE THE BURDEN OF ESTABLISHING THE SCOPE OF THE AGENCY, AND THE COURT DID NOT ERR IN THIS REGARD.

Appellants completely avoid the basic issue in this case, which is—what was the scope of the agency? Instead of attacking the findings which establish this basic factual issue, they attempt to circumvent them by charging that they are based on an erroneous application of law. Appellants argue first that Norbest had the burden of proving it could extend credit to the Illinois corporation, secondly that the trial court mistakenly placed the burden on appellants to prove that credit could not be extended, and thirdly that Norbest has not sustained the burden which it should have had placed upon it.

1. The Burden of Proof.

Appellants first base this argument that Norbest had the burden of proving it could extend credit to the Illinois

corporation on the assumption that Norbest acted as appellants' agent *to sell* turkey logs to the Illinois corporation. Indeed on page 61 of their opening brief they state that Norbest assumed appellants' place as seller under the sales contract. All of the cases cited by appellants from page 34 to page 38 of their opening brief deal with fact situations in which the agent agreed to *sell* goods for the principal and allegedly breached its duty by extending credit. See *Leland v. Oliver*, 82 Cal. App. 474, 255 Pac. 775 (1927); *Lahr v. Kramer*, 91 Minn. 26, 97 N.W. 418 (1903); *San Pedro Lumber Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410 (1898); *Schwarting v. Artel*, 40 Cal. App. 2d 433, 105 P.2d 380 (1940). All of these cases are distinguishable from the instant situation on their facts, and the assumption is groundless, for in the present case Norbest was not instructed nor did it agree *to sell* the turkey logs to the Illinois corporation. Its agency was much more limited and it agreed only to ship, to invoice, and to credit the partnership's account with Norbest when it received funds from the Illinois corporation. In effect the only thing done was to substitute, for the past practice of an invoice from Norbest to the partnership and an invoice from the partnership to the Illinois corporation, an invoice from Norbest to the Illinois corporation. The sale of these turkey logs to the Illinois corporation by the partnership had already taken place on June 10, 1954 (Pl. Ex. 6, R. 121, 16-22).

Each of the cases is distinguishable in yet another way. In *Leland v. Oliver*, *supra*, for example, the matter was heard entirely on plaintiff's testimony; defendant refused to introduce any testimony at all. Plaintiff had *proved* that *under its agreement* with the defendant, *defendant was to sell* and dispose of the crops and turn over one third of the value thereof to plaintiff *in cash*. Plaintiff further

proved that he had *not been paid*. Defendant argued that plaintiff also had to prove that defendant had in fact received payment. The court said:

“* * * we think the trial court did not err in denying the defendant’s motion for a nonsuit and that the burden was cast upon the defendant to show what he had done with the property and why he has not paid over to the plaintiff her share of the proceeds of the sale thereof, and upon his declining to do so, the trial court was authorized to enter judgment for the plaintiff.” 82 Cal. App. at p. 479.

In the instant case appellants have *not proved* that Norbest was to *sell and dispose of the turkey logs for cash*. Whether the transfer was to be for cash is the really basic factual issue. The facts show only that Norbest was to ship, invoice, and credit appellants only when the Illinois corporation paid. And in the instant case Norbest showed why it hadn’t turned over any proceeds to the partnership—it is undisputed that nothing remained after satisfying the partnership’s obligation to Norbest.

Appellants themselves admit that *San Pedro Lumber Co. v. Reynolds, supra*, is inapplicable on its facts since there is no fraud or bad faith, but cite *Reynolds v. Hook*, 109 Cal. App. 226, 292 Pac. 1000 (1930), as applying the *San Pedro* rule to the present case. The fact is that *Reynolds v. Hook, supra*, does not even discuss or indeed *mention* “burden of proof.” It is therefore not authority for appellants’ position.

A correct statement of the law on the burden of proof in a case like the present one is found in Mechem, *Agency* (2d ed., 1914) at Section 298:

“As has already been stated, the burden of proving agency, including *not only the fact of its existence, but its nature and extent*, rests ordinarily upon the party who alleges it.” (Emphasis added.)

This rule of law is most often cited in actions in which the principal is asserting a limitation on the agent's authority to escape liability to a third party. This is understandable because it is not often that a principal suing an agent will argue to an appellate court that he doesn't have to prove the terms of the agency. That this is also the rule of law as between principal and agent is established by *Lowry v. Atlantic Coast Line R. Co.*, 92 S.C. 42, 75 S.E. 278 (1912). In that case plaintiff-principal sued defendant-agent for loss and damage to a shipment of household furniture which plaintiff had shipped. In affirming a judgment for plaintiff for such loss and damage, the court said:

“It is ‘hornbook law’ that the agent must act within the scope of his authority or within the apparent scope of his authority. Whenever there is evidence that there is an agent acting in the apparent scope of his authority to do certain things, and it is shown that he has done these things apparently acting in the scope of his authority, then the burden would be shifted to the other side, and it would be necessary for them to show by the greater weight of evidence that these acts on the part of the agent were outside of this authority. *A principal who asserts that his agent has acted outside of his instructions must show it by the preponderance of the evidence.* *Whaley v. Duncan*, 47 S.C. 139, 25 S.E. 54.” 75 S.E. at p. 281. (Emphasis added.)

The risk of nonpersuasion in the instant case was on appellants. They were required to show by a preponderance of the evidence that Norbest violated a limitation on its authority, i.e., to establish in the first place what instructions were given to the agent. Appellants state on page 34 that “*once the agency relationship has been established, the California courts allocate to the agent the burden, etc.*” This is the whole point—the agency relationship which was

established here precludes the contentions appellants are making.

On pages 38 and 39 of their opening brief appellants cite cases involving agents for collection and conclude from these cases that Norbest must account to the principal for the total amount collected or discharge the liability by proving it was authorized to extend credit. The cases cited are *Luckehe v. First National Bank of Marysville*, 193 Cal. 184, 223 Pac. 547 (1924) and *Stetson v. Briggs*, 114 Cal. 511, 46 Pac. 603 (1896). Again, as before, these cases are totally inapplicable because Norbest was not an agent for collection, as that term is traditionally used.

In addition, these cases only say that an agent for collection must not accept anything other than money in payment of the debt to be collected. Nothing but money was accepted by Norbest. They do not say, as appellants would have this Court believe, that if the agent fails to collect the entire amount of the debt because the debtor refuses to pay, the agent is then liable to the principal for the unpaid balance. We are not concerned with the law of guaranty or insurance. If the Illinois corporation in fact owed appellants the amount which appellants claim they should have received, that amount is still owing, unless barred by the statute of limitations. Norbest has done nothing to prejudice appellants' rights to collect the balance due from the Illinois corporation if in fact they have a legal right to do so.

Comment (a) on Clause (a) of Section 72 of *Restatement of the Law of Agency* 2d, at page 186, states :

“*Comment on Clause (a) :*

a. *Payment in full.* Authority to collect does not include authority to compromise, to release any part of the debt, or to permit a deduction because of an alleged set-off or counterclaim. Nor is a collecting agent authorized to accept a part payment, even with-

out extension of time or other consideration, *if the part payment, as the agent has notice, would prejudice the collection of the residue, as where it affects the choice of an appropriate remedy or the court in which suit must be brought. The receipt of part payment, however, is authorized if such receipt does not prejudice the position of the principal, and in many situations it is also authorized because of the circumstances under which the agent is employed, as where an overdue claim against an impecunious debtor is given to a collection agency.*" (Emphasis added.)

To the same effect see Mechem, *Agency* (2d ed., 1914) Section 955.

Thus even if Norbest was an agent for collection it did not breach a duty when it accepted part payment from the Illinois corporation, for there is no showing that appellants' rights to collect the balance from the Illinois corporation were prejudiced.

2. The Trial Court Did Not Err.

Having made the first unwarranted and illogical assumption that the burden of proof was on Norbest to prove the scope of the agency, appellants are forced to say something to attempt to sustain the next step in their argument that the court improperly imposed that burden on the appellants. It is difficult even to answer this argument because the basic assumption is so incorrect.

Appellants assert that because of the sentence in the Memorandum for Judgment (R. 33) to the effect that:

"The evidence that credit could not be extended by the agent was ambiguous, and therefore not persuasive.

* * *"

it must be necessarily implied that the court placed upon the appellants the burden of showing that Norbest could not extend credit (Appellants' Brief, p. 42).

Irrespective of where the proof came from, it is the law, as quoted by appellants in their own brief (*Aetna Insurance Company v. Taylor*, 86 F.2d 225, 227 (5th Cir. 1936), Appellants' Brief, p. 40), that the burden of proof is satisfied by actual proof of the facts of which proof is necessary regardless of which party introduces the evidence. It is certainly abundantly clear from the facts that the agency agreement did not include any requirement or agreement that credit was not to be extended (See pp. 20 to 21, *supra*) and that it did include the right to invoice on open account (See pp. 21 to 26, *supra*). Therefore, even if we are to assume for the purposes of argument that appellants' position is correct, the question of burden of proof is no longer relevant since it has been satisfied by proof of the facts.

Apart from this, however, the position of appellants in this respect is simply not true. The whole of the trial court's statement in its Memorandum for Judgment is as follows:

"From the evidence the Court concludes that the defendant did not violate its understanding with plaintiff. The evidence that credit could not be extended by the agent was ambiguous and therefore not persuasive. From all of the evidence, the Court concludes that defendant had authority, either express or implied, to act as it did." (R. 33)

The trial court was thus saying:

1. The facts establish that Norbest had the understanding with appellants and authority from appellants to ship directly to the Illinois corporation, to invoice the Illinois corporation for these shipments and to receive funds from the Illinois corporation. This is what Norbest did do.

2. The contention advanced as a part of the pleading by appellant and as a part of its proof that there was a restriction on Norbest's authority in that all shipments had to be made by sight draft bill of lading and could not be made by invoice was ambiguous and could not be believed.

A fair reading of the Memorandum for Judgment can lead only to this conclusion, and it is impossible to infer from this memorandum that the court allocated a burden of proof one way or the other. The court clearly based its decision upon all of the evidence.

As a part of this same argument, appellants state at page 42 that there is no express finding that Norbest could extend credit. This statement is rather shocking in view of the express finding (Finding VIII, R. 38) that "it was orally agreed * * * that defendant would invoice the Illinois corporation" and the conclusion (Conclusion of Law III, R. 41) that "Defendant agreed to act as the gratuitous agent * * * for the purposes of shipment of turkey logs to, invoicing of and receipt of funds from Turkey Log Corporation of Illinois."

3. The Evidence Supports the Findings.

Finally, appellants at pages 44 through 51 and 57 through 67 of their opening brief rehash selected portions of the facts and the evidence, concluding that Norbest has not met its burden of proof and therefore the judgment of the District Court should be reversed.

During the course of this argument, appellants set forth eleven items of "undisputed evidence" which allegedly support their conclusion. Not only are many of these items disputed, they simply do not support appellants' assertions.

The first four items, listed on pages 45 and 46 of Appellants' Opening Brief concern the contracts between Norbest and Towle and Towle and the Illinois corporation, and a collateral contract between Norbest and the Illinois corporation. What any of these contracts may have said is irrelevant to the basic issue in this case—which is, what were the terms of the agency? It should be noted, however, that the Norbest contract with appellants and appellants' contract with the Illinois corporation did *not* provide for *cash on delivery*. They simply provided for partial payment in the event of partial withdrawals as distinguished from the general requirement for total payment by August 1. The collateral contract between Norbest and the Illinois corporation provided for “invoice *or* sight draft.”

In item 4, appellants speak of Norbest “relaxing” its cash on delivery “requirements” to appellants and appellants in turn “relaxing” their cash on delivery “requirements” to the Illinois corporation. This statement is patently false and misleading. Such requirements were never “relaxed” because they never in fact existed. Nor were any such requirements observed by any of the parties from the very inception of the contracts. The facts are undisputed that Norbest had never insisted upon a cash payment by the partnership before turkey logs were delivered to it. Norbest *invoiced* the partnership, and the partnership paid these invoices after receiving them. Similarly, the partnership had never insisted on cash on delivery from the Illinois corporation and had always invoiced it.

This point is also raised at pages 59-61 of the opening brief in support of an argument that an agent does not have authority to waive a contractual provision favorable to his principal. As just mentioned, the contracts did not require that the price be paid in cash *before* delivery of

the turkey logs. This is not the meaning of the contractual provisions, and the subsequent action of the parties in regard to these provisions sustains this.

It is a general rule of law that when the action of all parties to an agreement indicates that they place a particular interpretation upon that agreement, that meaning should be adopted by the courts if a reasonable person could attach such a meaning to the contract.

See, *Restatement of the Law of Contracts*, Section 235 (e), which provides as follows:

“(e) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.”

See also, *Universal Sales Corporation v. California Press Manufacturing Company*, 20 Cal. 2d 751, at 761-2, 128 P.2d 665 (1942), which stamps the approval of the California Supreme Court on this principle of interpretation.

In *Lease v. Corvallis Sand & Gravel Co.*, 185 F.2d 570 (9th Cir. 1950), Judge Pope said:

“We think that this September 3 agreement which the parties proceeded to follow and carry into effect was an interpretation given by the parties themselves to their contract which a court should adopt. Williston on Contracts, 3d Ed. § 623; Restatement of Law of Contracts, § 235e.

“As stated by the Supreme Court of Oregon, *Kontz v. B. P. John Furniture Corp.*, 167 Or. 187, 115 P.2d. 319, 325, ‘The practical interpretation of the terms of a contract made by the parties while performing it is universally deemed a safe guide to the intended meaning of the instrument.’ ” 185 F.2d at p. 576.

While the case is not otherwise applicable on the facts, it is evident that this Court recognizes this rule of interpretation.

It is clear from the undisputed conduct of the parties before the instant litigation arose that a cash on delivery requirement was not within their contemplation.

Aside from any question of waiver, the crucial question again is, "What was Norbest authorized and instructed to do?" If it was authorized and instructed to ship and invoice, as the trial court found that it was, no waiver by an agent is in any way involved in this case. If any waiver of contractual rights was made, it was made by appellants themselves when they instructed Norbest to ship and invoice.

The remaining seven items of "undisputed fact" at pages 45 to 48 simply rehash isolated facts which were fully considered by the trial court (considered *supra* in detail at pages 5 to 16), who found "from all the evidence" that Norbest had authority, *express or implied*, to act as it did.

On pages 64 and 65 of their opening brief appellants mention in passing portions of certain findings of fact which they claim have no support in the record. These claims are clearly without foundation.

Findings V, VII, and IX: Appellants' argument is once again based on their inability to recognize that Invoice T-855 was a special situation and has nothing to do with the present controversy. This invoice dated August 5 was from Norbest to appellants in accordance with the regular practice followed up to that time. The agency agreement related to the balance of turkey logs on hand on August 6 or August 10. Shipment on Invoice T-855 had been made on August 3. T-855 *was* shipped sight draft at the special request of the partnership to a customer of the Illinois corporation. Only the portion which the consignee refused

to accept was put on invoice to the Illinois corporation at a price of \$1.05, and this was on August 16 after Norbest had been authorized to invoice the Illinois corporation directly.

Finding VI: Towle's letter of July 22, 1954, contained no instructions. It was a letter of *inquiry*. Appellants themselves recognize this when they refer to the letter on page 8 of their opening brief and speak of Towle's "proposals."

Finding X: Appellants again rehash the argument they made in regard to Findings V, VII, and IX and speak of an imaginary August 20, 1954, deadline. It was agreed at the Salt Lake City meeting that the Illinois corporation would pay in full for the turkey logs by August 25, 1954, not August 20, 1954. No shipments were made after August 25, 1954. In addition it cannot be argued that because the Illinois corporation failed to pay on time that Norbest violated its duty to ship and invoice. Norbest agreed and was instructed to ship, invoice, and receive funds. The Illinois corporation agreed to pay by a certain time. The failure of the Illinois corporation to carry out its agreement does not prove that Norbest violated its duty.

C. IN ANY EVENT, IT IS NOT THE FUNCTION OF AN APPELLATE COURT TO REDETERMINE OR TO REWEIGH THE EVIDENCE.

The foregoing proposition is so universally recognized that a statement of authority is hardly required. In *Liquid Veneer Corporation v. Smuckler*, 90 F.2d 196, 205 (9th Cir. 1937) this Court stated that a verdict should not be set aside if it can be sustained from any viewpoint or approach. This is so even though the appellate court might have reached a different conclusion on the evidence. *National Surety Co. v. Globe Grain & Milling Co.*, 256 Fed. 601, 602 (9th Cir. 1919); *O'Connor v. Ludlam*, 92 F.2d 50,

56 (2d Cir. 1937), *cert. den.* 302 U.S. 758, 58 S. Ct. 364, 82 L. Ed. 586 (1937).

This Court has also held that where an action is tried to the court, the *weight of the evidence* and the credibility of witnesses will not be reviewed. *Ware v. Wunder Brewing Co. of San Francisco*, 160 Fed. 79 (9th Cir. 1908).

It has already been shown that the Findings of Fact of the trial court are supported by substantial evidence. The issues are entirely factual. Not even appellants assert that the Conclusions of Law do not follow from the Findings of Fact. The Findings of Fact are therefore conclusive on this Court, and the judgment of the trial court must therefore be sustained.

II.

The Proffered Testimony of Towle and George Was Properly Excluded as Hearsay.

In the portion of their brief dealing with certain evidentiary rulings of the trial court, appellants advance an argument that would abolish the hearsay rule.

At the trial appellants sought to introduce the substance of certain conversations to the effect that Towle told George on August 9 to "inform" Adams that the balance of the inventory of turkey logs would be handled on a sight draft bill of lading basis and that Towle told Adams of the Illinois corporation on August 10 that future shipments must be paid for on sight draft. *No representative of Norbest was present at nor was it shown that Norbest was ever aware of or advised of these conversations.* The trial court properly ruled such evidence was clearly inadmissible as hearsay.

Appellants now argue that because Towle knew what he said to Adams and George and because George knew what he heard Towle say, the extrajudicial statements are not

hearsay (Appellants' Brief, pp. 52-3). To state such a proposition is to demonstrate its complete absurdity. Under such a rule of evidence, testimony could always be admitted as to extrajudicial assertions made to or by the witness, for the witness obviously knows what was said to him and what he said. A citation of authority on this point is hardly necessary. But see, for example, Witkin, *California Evidence* (1958 ed.) Section 209, at p. 235:

"A prior out-of-court statement, offered to prove the truth of the matter stated, is inadmissible hearsay even though the declarant is present in court as a witness.

* * *"

None of the cases cited by appellants on page 53 of their brief even remotely support their position that the proffered testimony was not hearsay. The extrajudicial statements of Towle are clearly hearsay *unless they are not offered as assertions to evidence the truth of the matter asserted*.

This of course is the next position taken by appellants—the testimony was not offered to prove the truth of the matter asserted, but only to prove that the statements were in fact made.

It must be borne in mind that both the basic factual issue and the *matter asserted* was that an agency was created in which Norbest was instructed to ship on a sight draft bill of lading basis only.

If the testimony was not offered to prove the truth of the matter asserted, then it was irrelevant. The fact that Towle had conversations with George and Adams or anybody else is not relevant or material to the question of the scope of the agency created. It is only the substance of those conversations that is important, and it is this substance that appellants cannot prove without violating the hearsay rule.

The testimony was obviously offered to show that:

1. Towle told Adams future shipments would be on sight draft;
2. Towle told George to tell Adams that future shipments to the Illinois corporation were to be on sight draft.

It would be difficult to find a clearer example of hearsay. It is abundantly clear that the testimony was offered only to prove that such instructions were given to Norbest or to raise an inference that such instructions were given to Norbest.

This is admitted by appellants for they next argue that the evidence was offered as circumstantial evidence to show the understanding that was reached among the participants in the Salt Lake City meetings. Indeed, on page 56 of their brief, appellants state that the understanding reached among the participants at the Salt Lake City meeting was the fact in issue, "and the nature of instructions given by one and received by two of the participants was a circumstance to establish just what understanding actually was reached." The cases cited by appellants in support of their position (*People v. Fischer*, 49 Cal. 2d 442, 317 P.2d 967 (1957) and *People v. Radley*, 68 Cal. App. 2d 607, 157 P.2d 426 (1945)) clearly do not sustain it.

If, as appellants state, the evidence was offered to show circumstantially what was agreed upon at the meeting of August 10, then it is clear that the evidence is offered to prove the truth of the matter asserted, and, as such, is excludible as hearsay.

Finally, appellants assert that the testimony is admissible, even if hearsay, under the *res gestae* exception to the hearsay rule. The "transaction" referred to in Section 1850 of the California Code of Civil Procedure in the in-

stant case must be the meeting on August 10, 1954, with Mr. Beyers of Norbest, at which the agency agreement was made. Clearly, statements made by Towle to George in the absence of Beyers on August 9, 1954, a full day *before* the "transaction," and by Towle to Adams in the absence of Beyers early in the morning of August 10, some time *before* the "transaction," are not part of the transaction of August 10, 1954.

Again appellants' cases do not even begin to support their position. In *Sethman v. Bulkley*, 9 Cal. 2d 21, 68 P.2d 961 (1937), the court held admissible a letter written *at the same time* that certain deeds were executed. In *Airola v. Gorham*, 56 Cal. App. 2d 42, 133 P.2d 78 (1942), it was held that testimony as to what was said by a person at the time he executed a deed was admissible under the *res gestae* exception. As the court pointed out in *People v. Edwards*, 13 Cal. App. 551, 554, 110 Pac. 342 (1910), the term "*res gestae*" signifies circumstances and declarations *growing out of* the main act which are contemporaneous with it and illustrate its character. This statement immediately raises two objections to appellants' argument in the instant case. These statements neither grow out of (since they were made some time before) nor are they contemporaneous with the main act.

The infirmity in appellants' argument is summarized by the Supreme Court of California's statement in *People v. Wong Ark*, 96 Cal. 125, 128, 30 Pac. 115 (1892), wherein it was held that it was not permissible to introduce, under the guise of *res gestae*, a declaration which is *not the fact talking through the party, but the party's talk about the facts*. The fact here is what instructions were given by appellant to Norbest—not to somebody else. The testimony offered by appellants which was excluded by the trial court is clearly a party's talk about the facts.

Even making the wild assumption that appellants are correct in either of their positions, it has not been shown or indeed argued that appellants were prejudiced by the exclusion of the evidence. It is "hornbook" law that a party must show the respect in which he was prejudiced by the alleged error (*Chase National Bank of New York v. Fidelity and Deposit Co. of Maryland*, 79 F.2d 84, 86 (2d Cir. 1935)). Appellants have not done so.

It is an equally undisputed rule of law that the judgment of the trial court will be affirmed in cases in which rulings on evidence, even if erroneous, were not seriously prejudicial. *New York Life Ins. Co. v. Rees*, 19 F.2d 781, 786 (8th Cir. 1927). See also *Stegeman v. Pennsylvania R. Co.*, 6 F.2d 873 (6th Cir. 1925).

In the instant case there is ample evidence, apart from the proffered testimony, to sustain the findings, and the proffered testimony is merely cumulative.

CONCLUSION

Under the applicable law appellants had the burden of proving the scope of the agency agreement between them and Norbest, that Norbest violated its instruction as agent, and that appellants were thereby damaged. This they failed to do in the trial court.

The findings of the trial court that Norbest had authority to ship turkey logs to the Illinois corporation, to invoice the Illinois corporation on open account, and to receive funds from the Illinois corporation to be applied to appellants' account with Norbest are fully sustained by the evidence. They are therefore binding on this Court. It is undisputed that the Illinois corporation refused to pay more than would be required to discharge appellants' debt to Norbest. Consequently no credit ever accrued in favor of appellants.

For these reasons the judgment of the District Court should be affirmed and appellee should be awarded its costs on this appeal.

Dated : October 23, 1959

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No. 16,317

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE J. TOWLE and FRED GEORGE, individually and as copartners doing business as TOWLE-GEORGE TURKEY LOG COMPANY, also known as TOWLE FOOD PRODUCTS Co., a partnership,

Appellants,

vs.

NORBEST TURKEY GROWERS ASSOCIATION, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF

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Appellee.

APPELLANTS' REPLY BRIEF

Appellants file this brief in reply to appellee's answering brief. The argument in appellee's brief does not respond to the issues entirely in the order of appellants' opening brief, making exact correlation of the argument difficult. Therefore, in an effort to put the issues in orderly fashion appellants here readopt the order of their opening brief. References to pages in each of the prior briefs indicate where the cor-

responding subject matter is there discussed. References to appellants' opening brief are (AOB —), references to appellee's answering brief are (AAB—), and to the record (R —) and the exhibits (Pl. Ex. or Def. Ex. —) as before.

STATEMENT OF THE CASE

Questions Presented

Norbest has stated the issues somewhat more broadly than have appellants. Nevertheless, the parties agree that the principal issue on this appeal is whether Norbest's agency included authority to extend credit to Illinois as it did. This specific issue is not entirely factual as Norbest contends but involves a question of law as to which party had the burden of proving that Norbest did have authority to extend credit.

Norbest apparently concedes that it is liable for any losses to appellants resulting from its extension of credit, if Norbest did not have such authority.

The Evidence

Norbest, in restating the evidence, charges that appellants have "ignored or misstated certain crucial facts and findings" (AAB 5). But in so restating the evidence, and throughout its brief, Norbest has completely ignored the most crucial fact in the entire record. Although Norbest admits that the agreement among the parties was confirmed at the August 10, 1954 meeting in Salt Lake City (AAB 12), it has completely ignored the undisputed documentary evidence that the understanding reached there was that the disputed turkey logs were to be *paid for* by August 20, 1954. (Pl. Ex. 13, R 135.)

The transfers here in dispute, itemized in appellants' opening brief (AOB 13, 25), were not paid for by the agreed date of August 20, 1954, but were made on and, indeed, after Illinois' default without any permission, express or implied, from appellants. Yet Norbest claims it made the disputed transfers in accordance with its agreement with appellants by shipping before August 25, 1954 (AAB 13, 14). Norbest's claim simply is not supported by the evidence. The August 25, 1954 date refers only to tonnage in Los Angeles as appears from the following pertinent phrase from Mr. Beyers' letter (Pl. Ex. 13, R 135) :

“* * * approximately 88,000 pounds stored on the Pacific Coast will be relabeled and paid for by Towle Foods Products Company by August 20th, except tonnage in Los Angeles, to be paid for by August 25th.”

Only tonnage other than that in Los Angeles is here in dispute (AOB 12, 13, 25).

Norbest throughout its brief has misstated appellant Towle's contemporaneous understanding that Illinois has “also agreed to be *invoiced and pay for some 80,000 lbs.* and pay up *by August 20*” (emphasis added, Def. Ex. A, R 145-6). Norbest from this language infers that the agreement reached in Salt Lake City was that Illinois merely was to be “invoiced” (AAB 3) and that Illinois would pay up “by a later date” (AAB 14). This clearly is not what appellant Towle stated. He stated without dispute that Illinois would be *invoiced and pay up by August 20*. There is no mention whatsoever of “invoicing on open account” as Norbest contends (AAB 13).

At the time of the August 10, 1954 meeting Illinois was already in default under its contract with appellants. The obvious purpose of the meeting was to insure transfer of the turkey logs and payment by Illinois by August 20, 1954, with a later date of August 25th applying only to tonnage in Los Angeles. Regardless of whether or not more limiting instructions were ever given to Norbest that shipments were to be only on a sight draft bill of lading basis, the agreement reached at Salt Lake City clearly was that *Illinois was to pay up by August 20th* on the disputed transfers. Yet, on August 20, 1954 Illinois was in default and, nonetheless, on that date and for several days thereafter, Norbest did extend credit to Illinois on the disputed transfers. Norbest would have this Court completely ignore the "complicated mathematics" clearly detailing this violation of Norbest's authority (AAB 15).

Every one of the enumerated transfers was made on or after the August 20, 1954 deadline with the exception of the transaction on invoice T-855. This shipment was transferred to Illinois on credit on August 16, 1954 in clear violation of *specific instructions* from Towle to make the transfer on a sight draft basis. Norbest admits that these instructions were received from Towle and yet argues that the partial transfer on an open account basis was not in violation of such instructions (AAB 10 footnote). There is nothing in the record showing Norbest had authority to deviate from these specific instructions. Norbest does not respond to appellants' argument (AOB 13).

Norbest in discussing the correspondence prior to the August 10, 1954 meeting (AAB 7-12) contends

that appellant Towle's letter of July 22, 1954 (Pl. Ex. 8, R 123-124) was in the nature of an inquiry only; that Norbest's reply of July 30, 1954 (Pl. Ex. 9, R 125-6) did not consent to any instructions presented in that earlier letter; and that Norbest consented to these instructions for the first time in its letter of August 6, 1954 (Pl. Ex. 12, R 133-134). Whether appellant Towle's initial letter be characterized as one of inquiry or as one of instruction, it is clear on its face that Towle authorized Norbest to ship and to invoice Illinois directly on the basis of the \$1.05 per pound Illinois had agreed to pay appellants, to collect payment from Illinois, to credit the payments to appellants' account, and remit the 10¢ per pound profit to appellants' office. Regardless of when it agreed to do so, Norbest acted under this authorization and must be bound by it.

It is manifest that Norbest agreed to this authorization in its reply of July 30, 1954 which in the very first line specifically refers to Towle's letter of July 22, 1954 and then states in the second paragraph:

"* * * We will be glad to follow your instructions, and at such time as a credit accrues to you, we will forward the money to your organization in Walnut Creek, California."

The record discloses no instructions to forward accrued credits to Walnut Creek to which this statement by Norbest could possibly refer other than the language in Towle's July 22, 1954 letter. Norbest asserts that it was not until August 6, 1954 that Norbest "for the first time" advised appellants that "it would be willing, on behalf of the partnership, to make shipments of the

balance of the turkey logs to the Illinois corporation directly, to bill the Illinois corporation at \$1.05 per pound, and to credit the partnership's account with the difference" (AAB 9) and this was so found by the trial court (Finding VII, R 37-8). It is true that August 6, 1954 was the first time Norbest so advised appellants in those particular words. However, the instructions of Towle's initial letter manifestly were accepted prior to that date in its letter of July 30, 1954.

Norbest (AAB 11) belittles the instruction in appellant Towle's letter of August 3, 1954 to Norbest (Pl. Ex. 11, R 130-2) that:

"* * * As for future deliveries, I think that the sight draft payable to Norbest is the only solution to insure prompt payment."

This statement is entirely consistent as a direction to Norbest in view of appellant Towle's definition of the term "invoice" as "a C.O.D., a sight draft" (R 78).

Norbest throughout its brief contends that the term "invoice" means an open account credit transaction (AAB 20, 21-26, 32). This definition of the term is not supported either by the record or by any cited legal authority. Indeed, the only express definition of the term "invoice" and of the term "invoice and pay for by a date" is the testimony of appellant Towle (R 78):

"* * * when you invoice, invoice and pay for by a date, I think that is significant of probably —aside from a C.O.D. a sight draft, a C.O.D."

Clearly, Towle's definition of the term does not contemplate a credit transaction and it is significant that the first time the word "invoice" appears in the foregoing documentary evidence is the initial use of the

term by Towle in his letter of July 22, 1954. There is no other evidence in the record that the word "invoice" or "invoice and pay for by a date," to wit, by August 20, 1954, means a credit transaction contemplating payment after that date.

With this review of the evidence, appellants submit that, regardless of whether more limiting specific instructions to ship only on a sight draft bill of lading basis were made or not, it is uncontrovertible that the disputed transfers exceeded the limited authority of Norbest as is evidenced by the documents showing the agreement reached at the August 10, 1954 Salt Lake City meeting. Those documents definitely show that the parties agreed that the balance of the turkey logs held in dispute were to be invoiced and paid for by August 20, 1954. Nonetheless, when Illinois was in default on its payments, Norbest made the deliveries here in dispute on and after August 20, 1954.

ARGUMENT

Norbest has misstated appellants' argument (AAB 4-5). Appellants' position is and always has been that they did not confer upon Norbest, authority to make the disputed transfers to Illinois on a credit basis. The authority given Norbest did not include authority to make any credit transfers and particularly none after the August 20, 1954 deadline. In addition, appellants contend that Norbest's authority was even further limited by specific instructions given to Norbest to the effect that the disputed transfers were to be made *only* on a sight draft bill of lading basis.

Uncontroverted documentary evidence establishes that the disputed transfers were to be invoiced and

paid for or relabeled and paid for by August 20, 1954. It was impossible to meet this deadline except by transferring on a sight draft or C.O.D. basis. Credit transfers clearly could not have been contemplated, particularly on transfers made as late as August 20th.

Whether or not more limiting instructions relating to sight draft shipment only were given, appellants contend Norbest had no authority to make the disputed transfers on credit. Moreover, since those same undisputed facts establish that Norbest did not comply with the specific authorization granted and agreed upon, under the applicable California law, Norbest has the burden of accounting to appellants or proving its authority to extend credit as it did. The trial court erroneously placed the latter burden of proof upon appellants.

NORBEST AGREED TO ACT AND DID ACT AS THE AGENT OF APPELLANTS.

Appellants recognize the rule of law that a principal must prove the general scope of authority granted and appellants have done so (AAB 17-19). There is no dispute over the trial court's findings that Norbest undertook to act and did act as appellants' agent for making the disputed transfers of turkey logs directly to Illinois upon Illinois' order, for invoicing Illinois, and for collecting the purchase price of \$1.05 per pound directly from Illinois (Findings VIII, IX; AAB 13). But as agreed upon at the August 10, 1954 meeting in Salt Lake City the disputed shipments were

to be invoiced and paid for by August 20, 1954. Norbest itself stated (Pl. Ex. 13, R 135) :

“* * * approximately 88,000 pounds stored on the Pacific Coast will be relabeled and paid for by Towle Foods Products Company by August 20th, except tonnage in Los Angeles, to be paid for by August 25th.”

The foregoing language establishes an August 20, 1954 deadline by which Norbest's duties relating to the disputed transfers were to be performed. It is manifest that the August 25, 1954 date refers only to “tonnage in Los Angeles” not here in dispute. The contemporaneous letter of appellant Towle (Def. Ex. A, R 146) confirms this deadline by which Norbest's duties were to be performed. He stated that Illinois:

“* * * have also agreed to be invoiced, and pay for some 80,000 lbs. and pay up by Aug. 20. * * *”

Norbest throughout its brief completely ignores this deadline of August 20th agreed upon by the parties. Norbest in restating findings VIII and IX infers that the August 25, 1954 date applies to the disputed transfers (AAB 22). This is not the case and the trial court did not so find. Judge Carter found merely that all of the 190,000 pounds were to be transferred by August 25th. The finding is accurate so far as it refers to the whole amount of turkey logs contracted for, but the uncontroverted documentary evidence establishes that the parties set up an earlier deadline for the disputed transfers.

The undisputed documentary evidence further shows that the disputed transfers of turkey logs were not in fact invoiced and paid for by the August 20,

1954 deadline. (Pl. Ex. 16-A, R 141.) Notwithstanding that the balance of the turkey logs, other than those in Los Angeles, had not been paid for by August 20th as agreed, Norbest made the disputed transfers of turkey logs to Illinois on a credit basis on August 20th, 23rd and 25th. Payment of the \$1.05 purchase price for these shipments was not collected by August 20th.

Whether the term "invoice," as here used, means "invoice on open account" as Norbest contends (AAB 21-26), "a sight draft, a C.O.D." as appellant Towle testified (R 78), or something else, Norbest clearly has not complied with what it had been instructed and authorized, indeed, what it had agreed, to do. Appellants submit that with the scope of Norbest's agency thus established, under California law Norbest must assume the burden of proving that it has properly accounted for the disputed turkey logs or their purchase price or prove its authority, if any, to extend credit as it did.

UNDER CALIFORNIA LAW NORBEST AS APPELLANTS' AGENT HAD THE BURDEN OF PROVING ITS AUTHORITY TO EXTEND CREDIT.

Although Norbest concedes that California law is applicable to the instant case (AAB 17) it cites no California authority to support its position with respect to the burden of proof on the specific credit issue presented here. Norbest refers only to general authorities which do not even purport to state California law. It cites no applicable California authority and quotes only general propositions of law from *Mechem* (AAB 28, 31); the *Restatement of the Law of Agency*

(AAB 30); and the law of South Carolina as recited in *Lowry v. Atlantic Coast Line R. Co.* (1912), 92 S.C. 42, 75 S.E. 278 (AAB 29). These authorities state generally that a principal has the burden of proving the extent of the agency and the principal's specific instructions. These general propositions may be true, but they do not refer to the particular fact situation in the case at bar and they do not state the California law on this point.

On the specific issue of burden of proof appellants have relied upon *Leland v. Oliver*; *Lahr v. Kramer*; *San Pedro Lumber Co. v. Reynolds*; *Schwarting v. Artel*; and *Reynolds v. Hook*, as reciting the California law that the burden of proof of its authority to extend credit, if any, rests upon Norbest in this case (AOB 34-7). Norbest attempts to distinguish these cases solely by stating that they do not apply to the present situation (AAB 27) in that they involve situations where the agent had agreed "to sell"; that Norbest did not here "agree to sell"; and that the sale of the disputed turkey logs "had already taken place on June 10, 1954" by virtue of the contract to sell (Pl. Ex. 6, R 121, 16-22) between appellants and Illinois. This purported distinction is untenable.

No sale was made on June 10, 1954 and in spite of its contention that a sale was made then (AAB 27), elsewhere in its brief Norbest admits that the agreement was merely an "agreement to sell" and not a sale in and of itself (AAB 2). Under California law a sale is defined in Civil Code, Section 1721:

"A sale of goods is an agreement whereby the seller *transfers* the property in goods to the

buyer for a consideration called the price.”
(Emphasis added.)

Clearly no sale was made on June 10, 1954 under California law as no transfer of the property in the disputed turkey logs took place at that time. The property was to be transferred at later dates in Chicago. The contract between appellants and Illinois was not a sale but merely a contract to sell.

The transaction in the present case which clearly meets the California Code definition of a sale is the Norbest transfer of title of the disputed turkey logs, on behalf of appellants, to Illinois in exchange for the agreed price of \$1.05 per pound. It was not until this transaction that the property in the turkey logs was transferred. Therefore, Norbest clearly was an agent “to sell,” or so closely analogous to one, that the facts in this case and those cited are indistinguishable.

Norbest states that *Leland v. Oliver* is different from the present case since “appellants have not proved that Norbest was to sell and dispose of the turkey logs for cash” or that they have not been paid (AAB 27-28). Indeed, the documentary evidence, namely, the contemporaneous letters written at the time of the August 10, 1954 meeting in Salt Lake City (Pl. Ex. 13, R 135; Def. Ex. A, R 146), on its face establishes that Norbest agreed to transfer turkey logs to Illinois and was to collect therefor the \$1.05 per pound purchase price by August 20, 1954. It is further undisputed that Norbest did not collect this cash purchase price by August 20, 1954 nor did Norbest pay it to appellants. Appellants submit that they have proved everything necessary under the *Leland* rule

to shift the burden to Norbest to account for the turkey logs or their purchase price.

Norbest then takes issue (AAB 30) with *Lucke v. First National Bank of Marysville* (1924), 193 Cal. 184, 223 P. 547 and *Stetson v. Briggs* (1896), 114 Cal. 511, 46 P. 603 cited by appellants as California authority that, in situations analogous to the case at bar, an agent to collect money must collect only money (AOB 38-9). Anything short of actual cash is insufficient. These cases clearly place the burden on the agent to prove his authority to collect the principal's funds other than in the form of cash or money. Norbest contends it was not a traditional agent for collecting money and further that it did receive nothing but money from Illinois. Indeed, it is undisputed that Norbest accepted only the credit of Illinois by the August 20, 1954 deadline as payment for the disputed transfers of turkey logs. It did not even receive part payment in cash. Appellants submit that, whether Norbest was a "traditional" agent for collection or not, it nevertheless had agreed to collect \$1.05 per pound for the disputed turkey logs by August 20, 1954. This it did not do and as a consequence, it now has the burden of accounting to appellants for the \$1.05 it agreed to collect or of proving its authority, if any, to extend credit as it did.

Appellants submit that Norbest has not shown any of appellants' authorities to be inapplicable to the present facts and has referred to no California authority to the contrary. In fact, it has referred to no California authority whatsoever to support its contention that the

burden of proof is properly allocable to appellants on this issue.

THE DISTRICT COURT ERRED BY NOT ALLOCATING TO NORBEST THE BURDEN OF PROVING IT COULD EXTEND CREDIT.

Norbest states it is impossible to infer from the memorandum for judgment that the trial court allocated a burden of proof one way or the other (AAB 33).

Appellants contend an inference of allocation of the burden to appellants necessarily follows from the memorandum for judgment considered with the fact that no finding was made that Norbest was actually authorized to extend credit to Illinois. The trial court found merely that Norbest did not violate any "instructions" from appellants (Findings IX, X, R 39-40) and that Norbest agreed to "invoice" Illinois (Finding VIII, R 38) without any attempt to define the term "invoice" as meaning a right to extend credit. Thus, the court found not that Norbest could extend credit, but merely that what Norbest did was not in violation of any instructions or agreement.

The language of the court that "* * * the evidence that credit could not be extended by the agent was ambiguous, and therefore not persuasive * * *" together with the foregoing findings, in which there is no mention of the word credit, can only result in the inference that the court placed upon appellants the burden of showing Norbest could not extend credit in order to establish their right to recovery. This allocation of the burden of proof was erroneous under the California law.

IRRESPECTIVE OF WHETHER THE DISTRICT COURT PROPERLY ALLOCATED THE BURDEN OF PROOF, THE EVIDENCE IS NOT SUFFICIENT TO SHOW THAT NORBEST COULD EXTEND CREDIT.

The evidence in the present record does not support Norbest's contention that it was authorized to transfer the disputed turkey logs on an "open account" credit basis (AAB 20-26). Moreover, the court did not specifically find that Norbest was authorized to "invoice an open account" (AAB 23).

Norbest has been able to point to no specific grant to it of authority to extend credit to Illinois. Appellant Towle did not orally grant such authority (R 70) nor does the documentary evidence expressly state that Norbest could "extend credit" or "invoice an open account." To support its contention Norbest can only imply such authority by reference to the term "invoicing" appearing in the correspondence preceding and contemporaneous with the August 10, 1954 meeting, and to the practice of appellants prior to the agency.

Although the foregoing correspondence initiated by Towle uses the term "invoice" or "invoicing," it is always used together with language relating to collecting the purchase price of \$1.05 per pound, such as "invoicing and collecting" (Pl. Ex. 11, R 131) or "invoiced and pay for" (Def. Ex. A, R 146). This correspondence does not state "invoice on open account" and receive payment only if tendered, but rather it places upon Norbest the affirmative duty of *invoicing and collecting* the purchase price. The testimony of appellant Towle confirms this interpretation

of the term "invoice," first used by Towle, as meaning "a sight draft, a C.O.D." (R 78) and there is no other express definition of the term in the entire record.

Moreover, the correspondence contemporaneous with the August 10, 1954 meeting establishes that the parties agreed that the disputed shipments were to be invoiced and paid for "by August 20, 1954" (Pl. Ex. 13, R 135; Def. Ex. A, R 146). The transfers were not to be made "immediately" with payment to follow later by August 25th as Norbest contends (AAB 14, 22), but to be invoiced and paid for and this was to be done by August 20th. The documentary evidence clearly does not establish any grant of authority to extend credit or to "invoice on open account," and particularly not beyond August 20, 1954.

Authority to extend credit cannot be implied from appellants' conduct prior to establishment of the present agency relationship (AOB 49; AAB 23-24). The underlying contract (Pl. Ex. 6, R 16, 121) called for cash on delivery (AOB 46) and not "before" (AAB 34) or after. Illinois agreed to pay "forthwith" the price of the logs delivered. "Forthwith" is defined in *Webster's New International Dictionary*, 2nd Ed., as "immediately." Regardless of how the parties operated under this contract, its terms clearly required cash on delivery.

Although up to July 22, 1954 appellants had not required cash on delivery on all shipments to Illinois as prescribed by the contract, by July 22, 1954 it became apparent to appellants and to Norbest that Illinois was substantially in default and that some-

thing had to be done to insure prompt payment (AOB 46-7, items 5, 6, 7). For this reason, in authorizing Norbest to transfer logs directly to Illinois and collect the purchase price therefor, Towle instructed that "I think the sight draft payable to Norbest is the only solution to insure prompt payment" (Pl. Ex. 11, R 132). For the same reason, the Salt Lake City meetings were held.

Hence, even though Norbest was aware of appellants' prior relaxation of the contract terms (the record does not clearly show that it was), the circumstances existing at the time the agency was created, Illinois already in default, Towle's instructions to ship on sight draft, and the agreement that the logs were to be invoiced and paid for by August 20th, preclude any inference that Norbest was authorized to extend credit to Illinois or to "invoice on open account"—particularly not after August 20, 1954.

Whether the agency *was* or *was not* clearly spelled out so as to permit invoicing on open account (AAB 24-5), Norbest has still violated its agency with regard to the August 20th deadline by which the disputed shipments were to have been made, invoiced and paid for. This deadline is not ambiguous. The disputed shipments of turkey logs were made on and after August 20th as shown in appellants' opening brief (AOB 13, 25) when at the time they had not been paid for. Shipment by Norbest was clearly in violation of the agency authorized and agreed upon. Norbest as appellants' agent was under a clear duty to "retain possession" of the disputed turkey logs until "payment or tender of the price" as provided by *Cali-*

fornia Civil Code, Section 1774 (AOB 60-63). Notwithstanding Illinois' default, Norbest did not retain possession of the subject turkey logs but transferred them on credit, thereby causing the losses for which appellants here seek recovery.

Appellants submit that the documentary evidence, the undisputed testimony, and the disputed testimony considered only most favorably to Norbest, is not sufficient to show that Norbest could extend credit to Illinois and certainly not beyond the August 20th deadline. The findings itemized by appellants (AOB 50, 64-66) are therefore "clearly erroneous" and subject to this Court's correction. Moreover, although the documentary evidence clearly establishes the August 20th deadline, and its existence is not disputed anywhere in the record, the trial court made no finding relating to it. Clearly, it is within the power of this Court to draw its own conclusion from such undisputed evidence (AOB 64).

THE DISTRICT COURT ERRED IN EXCLUDING AS HEARSAY CERTAIN TESTIMONY OF APPELLANTS.

Norbest takes issue with appellants' contention that the proffered testimony was not hearsay since it was not "offered to prove the truth of the matter stated," but was offered merely to prove that certain statements were made (AOB 52-6; AAB 38-40).

This Court in *Fred Harvey Corporation v. Mateas* (9th Cir. 1948) 170 F. 2d 612, 614 held admissible similar extrajudicial declarations solely for the purpose of showing that such utterances had been made. The Court there referred to well-established California

authority including *Smith v. Whittier* (1892), 95 Cal. 279, 30 P. 529, where the court stated, pages 293, 532:

“* * * If the fact sought to be established is that certain words were spoken without reference to the truth or falsity of the words * * * the testimony of any person who heard the statement is original evidence and not hearsay * * *”

Appellants also contend that the testimony was admissible under Section 1850 of the California Code of Civil Procedure (AOB 56). Norbest attempts to refute this contention by stating that the subject declarations preceded the “transaction” contemplated by C.C.P. 1850 and that the authorities appellant has cited hold that the declaration must be “at the same time” as the transaction it is offered to explain. (AAB 40-41.) *Airola v. Gorham* (AOB 56) supports appellants’ position even if only the August 10th meeting were considered as the “transaction.” Contrary to Norbest’s statement of the case (AAB 41), the declaration in *Airola* was made “a day or two” before the signing of the deed it was offered to explain. The appellant there tried to distinguish the facts from the *Sethman* case (AOB 56) because of the time element, just as Norbest does here. The court said at page 51, 82:

“* * * The suggested distinction is not sound. The conversation clearly ‘formed a part of the transaction’ within the meaning of the Code of Civil Procedure, section 1850. * * *”

Norbest’s two authorities (AAB 41) refer only to spontaneous declarations, which are not here involved.

For the foregoing reasons the testimony in the case

at bar has been erroneously excluded. Moreover, such exclusion prejudiced appellants' case by eliminating relevant evidence from which the trial court might have, and should have, concluded that the parties agreed to sight draft shipment only.

CONCLUSION

Appellants submit that the judgment of the District Court should be reversed and judgment entered for appellants in the amount of \$19,558.92 plus interest and costs.

Dated: November 16, 1959.

EDGAR B. STEWART,
HOWARD H. BELL,
Financial Center Building,
Oakland 12, California,

CARL HOPPE,
JAMES F. MITCHELL,
2610 Russ Building,
San Francisco 4, California,
Attorneys for Appellants.

No. 16319 ✓

United States
Court of Appeals
for the Ninth Circuit

DAVID ALLEN PARR,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

MAR 26 1959

No. 16319

**United States
Court of Appeals**
for the Ninth Circuit

DAVID ALLEN PARR,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

J. B. TIETZ,
257 South Spring Street,
Los Angeles 12, California,
For Appellant & Defendant.

ROBERT H. SCHNACKE,
United States Attorney;
DONALD B. CONSTINE,
Assistant United States Attorney,
For Appellee & Plaintiff.

In the United States District Court for the
Northern District of California, Southern Division

Criminal No. 36116

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID ALLEN PARR,

Defendant.

INDICTMENT

Violation: Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a)—
(Refusal to Submit to Induction)

The Grand Jury charges that: David Allen Parr, defendant herein, being a male citizen, of the age 25 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948," as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 31 of the Selective Service System, City of Brooklyn, County of Kings, State of New York, which said Local Board No. 31 was duly created,

appointed and acting for the area of which the said defendant is a registrant, did, on or about the 25th day of April, 1957, in the City of Oakland, County of Alameda, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-A and having theretofore been duly ordered by his said Local Board No. 31 to report for induction into the Armed Forces of the United States, and having thereafter, at his own request, been transferred to Local Board No. 21 of the Selective Service System, in Sacramento, State of California, for induction into the Armed Forces of the United States, and having been duly ordered by the said Local Board No. 21 to report at Oakland, California, on the 25th day of April, 1957, for induction into the Armed Forces of the United States, and having so reported, did, on the 25th day of April, 1957, in the City of Oakland, County of Alameda, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto.

A True Bill.

/s/ STANLEY L. KING,
Foreman.

LLOYD H. BURKE,
United States Attorney.

Approved as to form:

/s/ J. W. RIORDAN, JR.

Penalty: Imprisonment not to exceed 5 years and/or fine not to exceed \$10,000.

Bail, \$1,000; Goodman, Judge.

[Endorsed]: Filed May 1, 1958.

[Title of District Court and Cause.]

MOTION TO QUASH SUBPOENA

Comes now Robert H. Schnacke, United States Attorney, and John H. Riordan, Jr., Assistant United States Attorney, and move to quash the subpoena duces tecum directed to "U. S. Attorney, Northern Dist. Calif., or his deputy or ass't.," served on United States Attorney on August 14, 1958, at San Francisco, California, directing him to appear and testify and bring with him at 9:30 o'clock a.m. on August 20, 1958, in the above-entitled case the complete secret investigative report made by the agent or agents of the Federal Bureau of Investigation and used by Hearing Officers of the Department of Justice, in conducting the hearing and making his report on the conscientious objections of David Allen Parr, the defendant, which was also used by the Department of Justice in making the recommendation to the appeal board, to-

gether with the report of the Hearing Officer to the Attorney General.

This motion is made on the authority and basis of the following cases:

Kaline vs. United States,
9th Cir., 235 F.2d 54;

United States vs. Nugent,
346 U.S. 1;

Simmons vs. United States,
348 U.S. 397; 215 F.2d 782;

Unreported opinion of United States District
Judge Louis E. Goodman in United States
vs. Richard Joseph Muelrath, CR. No.
35649, United States District Court, North-
ern District of California, Southern Di-
vision, July 31, 1957;

Blalock vs. United States,
247 F.(2) 615;

Meredith vs. United States,
247 F.(2) 622.

ROBERT H. SCHNACKE,
United States Attorney,

By /s/ JOHN H. RIORDAN, JR.,
Assistant United States
Attorney.

Notice of Motion

To: J. B. Tietz, Attorney at Law, 410 Douglas Building, South Spring and Third Streets, Los Angeles 12, California.

You will please take notice that on Wednesday, August 20, 1958, at 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, in the Courtroom of Honorable Albert C. Wollenberg, Room 248, Post Office Building, 7th and Mission Streets, San Francisco, California, the United States will move to quash the subpoena in the above-entitled case.

ROBERT H. SCHNACKE,
United States Attorney;

By /s/ JOHN H. RIORDAN, JR.,
Assistant United States
Attorney.

[Endorsed]: Filed August 18, 1958.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above-entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, Aug. 20, 1958.

/s/ DAVID A. PARR,
Defendant.

/s/ J. B. TIETZ,
Attorney for Defendant.

/s/ R. H. FORB,
Assistant United States
Attorney.

Approved:

/s/ GEO. B. HARRIS,
Judge, United States District Court, Northern Dis-
trict of California.

[Endorsed]: Filed August 20, 1958.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District
Court for the Northern District of California,
Southern Division, held at the Courtroom thereof,
in the City and County of San Francisco, on Mon-
day, the 6th day of October, in the year of our Lord
one thousand nine hundred and fifty-eight.

Present: The Honorable Michael J. Roche, District
Judge.

[Title of Cause.]

MINUTE ORDER GRANTING GOVERN-
MENT'S MOTION TO QUASH SERVICE
OF SUBPOENA

This case came on regularly this day for hearing

on motion to quash service of subpoena and for trial.

Donald B. Constine, Esq., Assistant United States Attorney, was present on behalf of the United States.

J. B. Tietz, Esq., appeared as attorney for defendant.

Opening statements made by counsel for both sides.

Mr. Constine introduced in evidence and filed a certain exhibit which was marked U. S. Exhibit No. 1.

Government's motion to quash service of subpoena was ordered granted.

The further trial of this case was continued to October 7, 1958, at 10 o'clock a.m.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

The defendant moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. The failure of the court to compel the production of the F.B.I investigative report and the report of the Hearing Officer to the Attorney General, and the order of the court sustaining the motion to quash the subpoena duces tecum made by the Gov-

ernment, or the ruling of the court prohibiting defendant to use said documents in his defense, constitute a deprivation of the defendant's rights to due process of law upon criminal trials, and also violates the statutes and rules of court providing for the issuance of subpoenas in behalf of defendants in criminal cases.

2. The denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer of the Department of Justice and by the Department of Justice to the Appeal Board were without basis in fact, arbitrary, capricious and contrary to law.

3. The report of the Hearing Officer relied upon by the Department of Justice and the Appeal Board, and the recommendation of the Department to the Appeal Board are arbitrary, capricious and illegal because they refer to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and were used by the Appeal Board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and Regulations was the only thing for the Hearing Officer, the Department, and the Appeal Board to follow.

4. The report of the Hearing Officer relied upon by the Department of Justice and the recommendation of the Department relied upon by the Appeal Board were based upon and/or were tainted with suspicion and speculation.

5. Defendant was denied a fair hearing before the Appeal Board in that the Appeal Board was not given any of the following evidentiary material: The full reports of the Federal Bureau of Investigation concerning the defendant, and the full report of the Hearing Officer.

6. The defendant was denied a fair hearing before the Appeal Board in that he was not given the following evidentiary material in time to use it before the Appeal Board decision (or at any time): The full reports of the Federal Bureau of Investigation concerning the defendant, and the full report of the Hearing Officer.

7. Defendant was denied procedural due process in that the local board failed to have available an Adviser to Registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the Regulations, and to defendant's prejudice.

8. The Government has wholly failed to show that defendant refused to submit to induction in that he was not given the opportunities provided by the applicable regulations to go through the mandatory induction prerequisites at the induction station.

9. There is no evidence to show that the defendant is guilty as charged in the indictment.

10. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

11. That said motion is also based on such other grounds, not hereinabove included, as will be set forth in defendant's Memo of Points and Authorities.

Dated: August 20, 1958.

Respectfully submitted,

/s/ J. B. TIETZ,

Attorney for Defendant.

[Endorsed]: Filed October 7, 1958.

United States District Court for the Northern
District of California, Southern Division

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Tuesday, the 7th day of October, in the year of our Lord one thousand nine hundred and fifty-eight.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

MINUTE ORDER DENYING DEFENDANT'S
MOTION FOR JUDGMENT OF ACQUIT-
TAL; SENTENCE

The parties hereto being present as heretofore, the further trial of this case was this day resumed.

John R. Hood and Sgt. Kenneth J. Vollmer were sworn and testified on behalf of the plaintiff.

The plaintiff introduced in evidence and filed a certain exhibit which was marked U. S. Exhibit No. 2.

Thereupon plaintiff rested.

David Allen Parr was sworn and testified in his own behalf.

The defendant introduced a certain exhibit which was marked Defendant's Exhibit A for Identification.

Defendant's motion for judgment of acquittal was Ordered denied.

Thereupon the defendant rested.

After arguments by counsel, and the case having been submitted and due consideration thereon had, the Court Adjudged the defendant Guilty as charged in the indictment.

The defendant was called for judgment. The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of One (1) Year.

Ordered that judgment be entered herein accordingly.

Further Ordered that defendant be granted a stay of execution of judgment for period of two (2) weeks.

United States District Court for the Northern
District of California, Southern Division

No. 36116

UNITED STATES OF AMERICA

vs.

DAVID ALLEN PARR

JUDGMENT AND COMMITMENT

On this 7th day of October, 1958 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty by the Court of the offense of Violation: of Section 12 (a), Universal Military Training and Service Act, (50 United States Code, App. 462 (a) Refusal to Submit to Induction). Defendant did, on or about April 25, 1957, at Oakland, California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United

States, as charged in the Indictment (Single Count) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year.

Further Ordered that execution be stayed until October 21, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Examined by:

/s/ DONALD B. CONSTINE,
Assistant U. S. Atty.

[Endorsed]: Filed October 8, 1958.

Entered October 10, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, David Allen Parr, resides at Route 2, Box 241, Orland, California.

Appellant's attorney, J. B. Tietz, maintains his office at 410 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U. S. C., Title 50 App., Sec. 462—Universal Military Training and Service Act, 1951.

On October 7, 1958, after a verdict of Guilty, the Court sentenced the appellant to one year confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed October 15, 1958.

The United States District Court, Northern District
of California, Southern Division

Criminal No. 36116

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID ALLAN PARR,

Defendant.

Before: Hon. Michael J. Roche, Judge.

PROCEEDINGS ON APPEAL

October 6 and 7, 1958

Appearances:

For the Plaintiff:

ROBERT H. SCHNACKE,

United States Attorney, by

DONALD B. CONSTINE.

For the Defendant:

J. B. TIETZ, ESQ.

(Opening statements.)

* * *

Mr. Constine: Counsel for the defendant and the Government have entered into two stipulations which are customary in these cases:

(1) That a photostatic copy of the selective service file may be introduced into evidence without the necessity of producing the original,

(2) and without the necessity of calling the draft board clerk to identify it, because that clerk will be from Brooklyn, is that correct?

Mr. Tietz: Yes. The photocopy is stipulated to be a correct copy of the original.

Mr. Constine: And we have the original here in case counsel wishes to examine it at any time.

The Court: Subject to any correction that you wish to make, it will be received.

Mr. Tietz: I would wish to make an objection to the introduction of one sheet of the exhibit. It has to be referred to by number, because this originated from a New York board, and they don't do as we do here, paginate and circle the number. We have to refer to it in this trial by date. It is a sheet headed 26 April, 1957. It is to the Northern District of California, U. S. Attorney, and it is signed in typewriting (in my copy), Charles M. Traynor, First Lieutenant, [2*] Infantry, Deputy for Induction. And the ground of my objection is that it is vague, hearsay and has conclusions, and specifically the conclusion that I would object to, which I say should have more detail, is this——

Mr. Constine: Well, I would suggest as I go through the file if there is a portion of it which counsel wishes stricken, he could make that objection at that time. At this time, we intend to produce the whole selective service file, as has been done in hundreds of cases in this district. As we come to the document, to which he may make ob-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

jection, he should do it then, in orderly procedure, without pulling one out now.

Mr. Tietz: Does counsel intend to go through every document?

Mr. Constine: I intend to point out to His Honor, as I do in these cases, the chronological history of the case. It won't take over ten minutes.

Mr. Tietz: When counsel comes to that particular document, I will make these specific objections.

Mr. Constine: I will offer in evidence as Government Exhibit 1, subject to your motion to strike, one document. Is that agreeable?

Mr. Tietz: Yes, it is.

Mr. Constine: I might state that I have marked certain pages in this file with slips of paper so I may call them to Your Honor's attention to aid your Honor in identifying [3] these documents.

(Selective Service file received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Constine: We have also stipulated, your Honor, that this defendant did refuse to submit to induction at Oakland, California.

Mr. Tietz: So stipulated.

Mr. Constine: And that the date was April the 25, 1957.

Now, your Honor, may I call your Honor's attention to certain documents in this file (Exhibit 1 in evidence).

(Exhibit 1 referred to.)

Mr. Constine: I might state that it has already

been stipulated that this defendant did refuse to submit to induction on April 25, 1957, at Oakland, California.

The Court: So stipulated, counsel?

Mr. Tietz: It is so stipulated.

Mr. Constine: The Government, therefore, your Honor, will rest at this time. However, there is one document in this file, (Exhibit 1) that counsel objects to being in the file, and that perhaps should be argued at this time before we rest.

Mr. Tietz: That is correct. That document is an 8½ x 11 sheet of paper dated 26 April, 1957, bearing the local board stamp, "Received May 1, 1957, Sacramento Local Board Cr." [4]

The objection specifically is to a portion of the fourth paragraph.

The Court: Read it.

Mr. Tietz: It states—I will read the third, if the Court doesn't mind.

The Court: All right.

Mr. Tietz: The stipulation will be even more exact:

"At the group induction ceremony, he refused to submit to induction."

We stipulate that is correct.

"He was removed from the group and informed that refusal to be inducted constitutes a felony under the provisions of the Selective Service Regulations, and of the penalties that may be imposed upon conviction."

Now, I do object to the last clause; that is, I say it should be specific, the proof should be specific.

That is a mere conclusion of the purported writer of this document. “* * * and of the penalties * * *”—we don’t know what he said; we just know that he said, “of the penalties.”

Then to go on to the fourth paragraph.

The Court: This is the paragraph you are objecting to?

Mr. Tietz: Well, I see now that I’d better make a formal objection to the last clause of the third paragraph because it is vague: “and of the penalties that may be imposed upon conviction.” [5]

We do not know in this courtroom what the officer said to the young man.

“He was again informed of the imminence of induction at which time the exact words were used as prescribed in Paragraph 24 a, Army Regulations 601-270, dated 5 April, 1956 * * *”

Now, I object to that on the same grounds, that we do not know what was said. What those words were, we would have to look elsewhere, and my contention is this should relate the facts, not a conclusion.

Mr. Constine: I might state, your Honor, that this is the routine type of letter that has been produced in every Selective Service case, and I thought that counsel had stipulated that this defendant refused induction.

Mr. Tietz: Oh, yes.

Mr. Constine: And that stipulation in the usual sense is to the effect that the ceremony was read to this defendant twice and he refused induction.

(Further argument.)

Mr. Constine: Perhaps, your Honor, I am confused as to what our stipulation was. If there is any question as to what happened at the induction station—and I thought we were stipulating to the fact that this man refused induction——

Mr. Tietz: There is no question, he refused.

Mr. Constine: I would like to finish my statement.

Mr. Tietz: Excuse me. [6]

Mr. Constine: If there is any question, we will have the officer here to testify. There is no problem. We will get him, and he can say what took place and what happened, if that is what counsel is going to object to. I thought we stipulated that this defendant refused induction.

Mr. Tietz: We did.

Mr. Constine: That the ceremony was read to him twice, in the usual course of induction.

(Further argument.)

* * *

The Court: Counsel is going to have a witness here to testify what the facts are.

Mr. Constine: If counsel desires now to have that.

Mr. Tietz: Couldn't we call him now?

Mr. Constine: We have to find the man. The man is in the Army. We thought we stipulated to this, but——

Mr. Tietz: We stipulated that he refused induction, but it was all mumbo-jumbo. The young man doesn't know, but his lawyer knows it wasn't a

legal ceremony, and the courts have held that it wasn't a legal ceremony.

* * *

(Further argument re letter dated 26 April, 1957, Charles M. Traynor, First Lieutenant, Infantry, Deputy for Induction, to U. S. Attorney, San Francisco, Calif.)

The Court: Matter submitted? [7]

Mr. Constine: We will submit it.

Mr. Tietz: Yes.

The Court: The objection will be overruled.

Mr. Constine: Now, I might state to your Honor, the Government was prepared to rest at this time in the case because, I might state with all due respect to Mr. Tietz, I did not speak to Mr. Tietz before this trial and there might be a misunderstanding as to what the stipulation was as to refusal to submit to induction. I didn't know I was going to try this case until a few days ago. However, since the defense has now arisen and Mr. Tietz has stated that he attacks the induction ceremony, that he questions that it was not the proper ceremony read and that this defendant was not advised that he may go to jail for five years for refusal to submit to induction, I have made inquiry and two members of the armed forces who were present at the induction ceremony on that date, whose names I have, are available in the Bay Area, one in the service and one out of the service (I would have to subpoena him). I am making an offer of proof,

so to speak. I also have two F.B.I. agents who questioned this defendant immediately following his refusal to submit to induction. They would be available, too.

This is an offer of proof, and not evidence—I have contacted Selective Service and they tell me the ceremony read in Oakland is the same ceremony as read for many years over there, and they, in each case, read from their manual and advise [8] the defendant that he is subject to a five-year sentence and a \$10,000 fine, and we will produce those witnesses, too. I would ask until tomorrow morning so I can get them here.

Mr. Tietz: In view of the statement made by the U. S. Attorney, about one minute ago, that this point which I have raised is a matter of defense, it occurs to me that it may not be necessary for these subpoenas to be issued, because I do not propose to put the defendant on the stand on this point or to offer any testimony on this point, so we have a clear-cut legal issue which will not require—If Mr. Constine is still of the same opinion at the end of the trial—the clear-cut legal issue being: Is there sufficient proof of all the elements of the case at this stage?—and we will offer no defense on that point.

Mr. Constine: Well, this is our position, it is our position that the entire ceremony was read to the defendant, including the penalty.

The Court: Get your witnesses here. Get them here tomorrow morning at 10:00 o'clock.

Mr. Tietz: In other words, the plaintiff has not rested?

Mr. Constine: No. We ask for a continuance. I thought we had stipulated to this, but, in all due respect to Mr. Tietz, I had not talked to Mr. Tietz previously.

The Court: 10:00 o'clock tomorrow morning. [9]

Tuesday, October 7, 1958—10:00 o'Clock A.M.

The Clerk: The United States of America versus David Allan Parr, further trial.

JOHN R. HOOD

called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

The Court: What is your full name?

The Witness: My name is John R. Hood.

The Court: What is your business or occupation?

The Witness: I am a special agent of the Federal Bureau of Investigation.

The Court: How long have you been so engaged?

The Witness: I have been so engaged 11 years.

The Court: Take the witness.

Direct Examination

By Mr. Constine:

Q. Mr. Hood, to what office of the F.B.I. are you assigned—I should say, what resident agency?

A. I am presently assigned to Berkeley resident agency.

(Testimony of John R. Hood.)

Q. And, Mr. Hood, were you an agent in this locality in April, 1957?

A. In April of 1957 I was assigned to the Oakland resident agency. [10]

Q. What squad were you assigned to at that time? A. Selective Service.

Q. And are you still a member of the Selective Service squad of the F.B.I.? A. No.

Q. And when did you cease that particular assignment? A. In September, 1957.

Q. Mr. Hood, directing your attention to April, 1957, April 25 to be exact, did you have occasion to visit the Armed Forces Induction Station in Oakland, California? A. Yes, sir, I did.

Q. And did you have occasion to witness the ceremony there at that time? A. I did.

Q. Are you able, at this time, to recognize a person known to you then as David Allan Parr? David Allan Parr is the defendant in this case; can you see him in the courtroom at this time?

A. Yes, I do.

Q. Will you kindly point him out to the Court?

A. The first row, the third person from the aisle.

Mr. Constine: Is that the defendant, Mr. Tietz? I have only seen him once.

Mr. Tietz: The third from the aisle?

The Witness: Yes, sir.

Mr. Tietz: You have picked the right one, [11] sir.

Mr. Constine: Will the defendant kindly take his proper seat?

(Testimony of John R. Hood.)

(Colloquy relating to the defendant taking place at counsel table.)

Q. (By Mr. Constine): Is this the first time you have seen the defendant since the occasion at the induction station, Mr. Hood?

A. I saw him on one other occasion.

Q. When was that?

A. That was on August 20 of this year in this building.

Q. That was when the case was originally set for trial? A. Yes.

Q. Now, Mr. Hood, to the best of your recollection, will you tell us where the defendant first was when you first observed him in the induction station at Oakland in April of 1957?

A. He was seated in the main lobby of the building of the induction center, which is on the second floor.

Q. And did you witness any ceremony involving that defendant—involving this defendant—at that time? A. Yes, I did.

Q. And will you kindly tell us who was present during the ceremony?

A. Another agent, Agent Miller.

Q. Of the F.B.I.?

A. Of the F.B.I., and Lt. Traynor. And Sgt. Vollmer. [12]

Q. Is Sgt. Vollmer here in the courtroom?

A. He was here.

Q. He is out now? A. Yes, sir.

(Testimony of John R. Hood.)

(All Government witnesses excluded.)

Q. Was there any other person present, to the best of your recollection?

A. I believe there was one other person there. I don't recall his name.

Q. To the best of your recollection, will you kindly advise the Court of what took place and what you observed regarding the defendant?

A. I observed the Lieutenant reading the induction ceremony——

Q. When you say "reading the induction ceremony," to the best of your recollection, will you tell us what was said?

A. The Lieutenant said, in substance, that this was the opportunity for the defendant to be inducted into the Armed Forces of the United States and that failure to do so would be a penalty of fine and/or imprisonment.

Q. Do you recall whether he specified the length of time of the imprisonment?

A. I believe he specified the time and the amount of money, but I don't recall.

Q. You don't recall what the amount is now?

A. No. [13]

Q. And tell us what the Lieutenant did, after he explained to the defendant—what took place?

A. Then he asked the defendant to step forward and be inducted, and he said the defendant's name, and the defendant refused to step forward.

Q. He did not step forward?

(Testimony of John R. Hood.)

A. He did not step forward.

Q. Was his name read again or was that the extent of the ceremony?

A. No. The name was read again and the defendant did not step forward.

Q. And is it your recollection that the defendant was advised there would be a fine and/or imprisonment for failure to do so?

A. This is my best recollection.

Q. Did you have an opportunity to question the defendant? A. Yes.

Q. And where did that take place?

A. In the same building, in a small anteroom.

Q. Who was present, besides yourself and the defendant?

A. Special Agent Miller of the F.B.I.

Q. What, if anything, did you say to the defendant and what did he say to you?

A. I identified myself as a Special Agent of the F.B.I. and I advised the defendant that any statement he made would be [14] voluntary and that such statement could be held against him in a court of law.

Q. You advised him that the statement could be used against him in a court of law if made?

A. I did.

Q. And then what took place, what was said to him and what did he say to you?

A. Then I asked him for his reasons for not being inducted, and he told me that his reasons were based on religious grounds.

(Testimony of John R. Hood.)

Q. Did he identify the organization or sect or religion that he belonged to?

A. Yes. He told me that he was a member of the Jehovah's Witnesses.

Q. Did you take a statement from the defendant? A. I did.

Q. And will you tell us how that statement was taken?

A. It was taken in longhand on a lined sheet of tablet paper.

Q. Who wrote the statement out?

A. I wrote the statement.

Q. Did the defendant sign it? A. Yes.

Q. Did he read it? A. Yes.

Q. Did he write anything on the statement himself? [15] A. He wrote a closing sentence.

Q. Do you have the statement with you?

A. I do.

Q. Will you produce it?

(Witness producing statement.)

Mr. Constine: May this be marked Government's Exhibit next in order, for identification?

The Court: Mark it for identification.

(Statement of defendant, 4/25/57, marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Constine): I might ask you this question, Mr. Hood. Do you recall whether you advised the defendant of any penalty for failure to

(Testimony of John R. Hood.)

submit to induction or failure to be inducted into the Armed Forces? What is your best recollection?

A. My best recollection is that I did advise him.

Q. What did you advise him, to the best of your recollection?

A. That there was a possibility of imprisonment and/or fine.

Q. For what?

A. For failure to be inducted.

Q. Do you recall whether you told him what the fine or imprisonment was?

A. No, I do not recall.

Q. You don't recall whether you advised him of the specific fine or imprisonment? [16]

A. That's right.

Q. You do recall that the Lieutenant did, but you don't remember at this time what the fine and imprisonment was?

A. That's right.

Mr. Tietz: No objection to this being received in evidence.

Mr. Constine: Does your Honor wish me to read it to the Court?

(Plaintiff's Exhibit 2 for identification received in evidence.)

Mr. Constine: Does your Honor wish me to read it to the Court?

The Court: Read it.

Mr. Constine (Reading): "April 25, 1957, Oakland, California." (And initialed at the top D.A.P.)

"I, David Allan Parr, furnished the following

(Testimony of John R. Hood.)

signed statement to John R. Hood, who has identified himself to me to be a Special Agent of the Federal Bureau of Investigation. No threats or promises have been made to me and I have been advised that I need not make any statement at all. I have been advised of my right to have an attorney and that the statement may be used in a court of law against me. I make this statement voluntarily. [17]

"I was born in Lewiston, Idaho, on April 17, 1933. My present address is 115 Mill Street, West Sacramento, California. I have been a Jehovah's Witness since 1940 and I have been a minister since 1941. I have refused to be inducted into the Armed Forces of the United States since I do not believe it is right to go to war or have any part of it. I believe anyone who is a true Christian would take the same stand. No one has advised me to refuse to be inducted into the Armed Forces."

(Initials D.A.P.)

On the other side, in other writing appears:

"Oakland, California, April 25, 1957.

"I have read the statement on reverse side of this page and it appears to be true. I understand that in my signing this there is no trickery involved.

/s/ DAVID A. PARR.

Witness:

JOHN R. HOOD,

Special Agent of the F.B.I.,
San Francisco;

ALFRED C. MILLER,

Special Agent, F.B.I., San
Francisco."

Mr. Tietz: There will be no cross-examination—if you are concluded with the witness, Mr. Constine.

Mr. Constine: All right.

(Witness excused.) [18]

KENNETH J. VOLLMER

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

The Court: Your full name?

The Witness: Kenneth J. Vollmer.

The Court: Your business or occupation?

The Witness: U. S. Army, attached to the recruiting—main station—assigned to the induction station.

The Court: How long have you been in the Army?

The Witness: A little over seven years.

Direct Examination

By Mr. Constine:

Q. Sgt. Vollmer, were you a member of the Armed Forces while at the induction station in April of 1957? A. I was.

Q. And how long have you been assigned to the induction station in Oakland, California?

A. Since I moved there in November of '56.

Q. Since November of 1956?

A. At Oakland, right.

Q. You have been in the Army seven years?

A. Right.

(Testimony of Kenneth J. Vollmer.)

Q. And how long have you been doing induction work on behalf of the Armed Forces?

A. Approximately five years. [19]

Q. And, Sgt. Vollmer, directing your attention to April, 1957, I will ask you in April of 1957 and to date, would you explain to the Court the procedures used to induct civilians into the Armed Forces at the Oakland Induction Center.

Mr. Titez: I will object, your Honor. It is the procedure used in this particular case that we are interested in.

Mr. Constine: Your Honor, the Government is entitled to establish before the Court the standard practices then in use at the time of this offense, in April, 1957. I don't know if this witness can remember this particular defendant, but he was a witness to the case and he is entitled to say what the standard procedure was, based on his experience as a member of the induction force. It is a standard practice, and whether he can remember the defendant goes to the weight of his testimony, not the admissibility of it.

Mr. Tietz: If the Court please, the law on the subject is readily ascertainable. It is not a matter of practice. It is a matter of what the Army regulation was. If Mr. Constine wants to read to the Court for the record the Army regulations then in force, I have no objection, but you asked the witness what they did regularly, is besides the point.

Mr. Constine: Well, it be to Mr. Tietz, but I

(Testimony of Kenneth J. Vollmer.)

intend to ask this witness whether he was present at the induction ceremonieis for Mr. Parr. He may not be able to identify [20] Mr. Parr, but he may recall the incident, and that is what I am leading up to at this time, and I make an offer of proof that he does recall the incident, your Honor, although he may not be able to identify the man that was present, and I think that goes to the weight of his testimony.

The Court: The objection will be overruled.

Q. (By Mr. Constine): In April of 1957, will you advise the Court of the procedure used, particularly the case involving Mr. Parr—if you have any recollection of this incident. I will ask you that, first: Do you have any recollection of the man that refused induction on April 25, 1957, a Jehovah Witness?

A. I do, in that when he came out to us for processing for induction, upon interview he so stated, that he was a Jehovah Witness, and at which time he was to sign his fingerprint card and other associated forms for processing and he refused to sign any of the forms.

Q. He refused to sign any of the forms. In your mind, will you advise the Court whether this is something different from the usual case?

A. Yes.

Q. Will you advise the Court of what occurred, what the induction practice was, how it was conducted in April of 1957, to the best of your recol-

(Testimony of Kenneth J. Vollmer.)

lection—just from the beginning to the end—involving this defendant? [21]

A. Upon interview, he was informed—well, he so stated that he was a Jehovah Witness, that he would refuse induction, at which time, after explaining the violation of the Selective Service Act pertaining to that and informing him of the penalty, he was then turned over to the Officer in Charge for interview.

Q. Do you remember who that was at that time?

A. At that time it was Lt. Traynor.

Q. Is Lt. Traynor still there?

A. No, at the present time he is still on active duty.

Q. Do you know where he is?

A. Not at the present time.

Q. Did you explain the penalty to the individual at that time going through the processing, this Mr. Parr? Was it you or someone in your presence that explained the penalty to Mr. Parr?

A. To the best of my recollection, I don't particularly remember if I did or the other sergeant involved there at the time did.

Q. But you heard the penalty explained?

A. Yes, it was explained.

Q. And what is that penalty, do you know yourself?

A. Trial by federal court, imprisonment in a federal institution for a period of five years and/or a fine of \$10,000, or both.

(Testimony of Kenneth J. Vollmer.)

Q. Were you present when the ceremony took place that Agent Hood observed? [22]

A. Yes.

Q. And tell us what took place at that time, to the best of your recollection.

A. At that time the defendant was in front of the Captain—at the Lieutenant's desk, and the Lieutenant so stated: You are about to be inducted into the Army * * * and went through the procedure in the regulation.

Q. Did he read him the regulation?

A. Yes. And he so informed him of the violation, at which time the Lieutenant called the defendant's name twice, and in both instances he refused to step forward and be inducted.

Q. Now, this failure to sign certain forms, when did that take place, to the best of your recollection?

A. Upon the initial interview, the first interview.

Q. I see. Were you present then?

A. To the best of my recollection, I don't know if I did or the other sergeant did, but I was in the immediate area.

Q. Have you, within your recollection in the five years you were with the induction station, ever witnessed an induction ceremony yourself involving a conscientious objector, one who refuses induction, in which the ceremony is not read and in which the penalty is not explained? A. No.

Mr. Tietz: My objection, of course, goes to all this witness' testimony? [23]

(Testimony of Kenneth J. Vollmer.)

The Court: The objection will be overruled.

Q. (By Mr. Constine): Are you able, Sgt. Vollmer, at this time, to identify the defendant?

A. He is vaguely familiar, but, to the best of my recollection, I couldn't definitely.

Cross-Examination

* * *

Redirect Examination

By Mr. Constine:

Q. Do I understand from your testimony on direct—and I am not satisfied with Mr. Tietz's question—do you recall whether the Lieutenant said that "Your step forward will constitute your induction," do you recall that?

Mr. Tietz: I am going to object, your Honor, to any leading question.

Mr. Constine: I am asking the direct question.

Mr. Tietz: It is a leading question.

The Court: The question is leading. The objection will be sustained.

Mr. Constine: Do you recall what was said at the end of the ceremony at this time? Do you recall whether anything was said about him being inducted and what would constitute his induction?

A. Yes, in that by taking a step forward it would constitute his induction, which was part—— [24]

Q. Do you recall that was said?

(Testimony of Kenneth J. Vollmer.)

A. To the best of my recollection, yes.

Q. Do you recall any ceremony that you have ever witnessed when that was not said? A. No.

Mr. Tietz: I will object——

Mr. Constine: He has a right to say that he——

The Court: That has been asked and answered.
Let it stand.

Mr. Constine: No further questions.

Mr. Tietz: No further questions.

(Witness excused.)

Mr. Constine: The Government will rest at this time, your Honor.

* * *

DAVID ALLAN PARR

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Court: Your full name, please?

The Witness: David Allan Parr.

The Court: Take the witness, counsel.

Direct Examination

* * *

Mr. Tietz: Offer it in evidence. (Letter, 2/18/57, M. H. Larson to David A. Parr.) [25]

Mr. Constine: Object to that as incompetent, irrelevant and immaterial. There is no foundation for this as part of the Selective Service file or that this defendant submitted it to the Selective Service, and

(Testimony of David Allan Parr.)

it is hearsay. You cannot submit an ex parte statement from a witness.

Call the witness to testify.

This is an ex parte statement. It is the rankest kind of hearsay. How do we know that was done under oath?

* * *

The Court: I don't think that statement is any evidence in this case.

(Letter, 2/18/57, Larson to Parr, marked Defendant's Exhibit A for identification.)

Cross-Examination

By Mr. Constine:

Q. You were given a copy of the recommendation of the Department of Justice, isn't that correct—you saw the recommendation? A. No.

Q. You never did see the recommendation of the Department of Justice to the Appeal Board?

A. No. I am sure I didn't.

Q. You never knew what the Department recommended to the Appeal Board in your case?

A. Yes. [26]

Q. How did you know that?

A. I received a resume of it—some notes on what Williams had told them, and that was given as the reason that they gave me the 1-A.

Q. And, in fact, did you write a letter to the Appeal Board disagreeing with certain matters in

(Testimony of David Allan Parr.)

Mr. Williams' report and the Department of Justice recommendation?

A. Disagreeing with the matters that were mentioned in this resume that I received of that recommendation, yes.

Q. And this is an original of a letter that is already in evidence. May I show you a letter dated February 11, 1957, from yourself in which you say:

"In answer to the 'Recommendation of the Department of Justice to the Appeal Board' "——

What are you referring to?

A. (Witness examining document): Well, this might be called leaving out a word there. Now, this would be correct, if I said "In answer to the Resume of the recommendation to the Department of Justice."

Q. Didn't the Department of Justice send you the recommendation of the Department to the Appeal Board, and didn't you see what they said and what they recommended?

A. Wait a minute, the recommendation of who?

Q. Of the Department of Justice.

A. To the Appeal Board. Now, is that the recommendation of Mr. Williams? [27]

Q. That is contained in the Department of Justice letter, yes, sir.

A. I said it was a resume of it.

Q. And did you have an opportunity to see what the F.B.I. had discovered about you, the same thing that Mr. Williams had—did he discuss that with you, what your reference had said?

(Testimony of David Allan Parr.)

A. That is the same case, now. It was a series of notes that they gave me that were incomplete, with no names, no nothing, just a few instances.

Q. May I show you this—was this the type of resume—it says “Resume of the Inquiry.” Isn’t that what you read and saw and observed—there were no names or no addresses?

A. Yes, this is it.

Q. May I ask you one additional question, then, Mr. Parr? At the time you were inducted, at the time of the induction ceremony in Oakland, California, you understood, did you not, that you would face an imprisonment penalty for failure to submit to induction?

Mr. Tietz: Now, object, there was no direct testimony on this, your Honor.

The Court: The objection will be overruled.

Mr. Tietz: I think it is improper cross-examination, your Honor.

The Court: The Court has ruled.

The Witness: The question? [28]

Q. (By Mr. Constine): Did you understand at the time you refused to step forward and submit to induction, because of your religious beliefs, as you say, that you would be facing civil penalty, a penalty of perhaps a fine, or imprisonment?

A. Well, yes, for the last ten years or so all of the Witnesses have to face it, either a penalty or go into the Army.

Mr. Constine: No further questions.

(Witness excused.)

Mr. Tietz: We rest, your Honor.

(Argument.)

The Court: I find the defendant guilty as charged.

[Endorsed]: Filed February 13, 1959. [29]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing & accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein, as designated by the attorney for the appellant;

Indictment.

Judgment & Commitment.

Extension of Time for Appeal.

Motion for Judgment of Acquittal.

Waiver of Jury Trial.

Motion to Quash Subpoena.

Subpoena.

Defendant's Exhibit A.

Plaintiff's Exhibits 1 & 2.

Minute Orders for October 6th & 7th, 1958.

Notice of Appeal.

Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of January, 1959.

C. W. CALBREATH,
Clerk,

[Seal] /s/ WM. J. FLINN,
Deputy Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the following is the original filed in this Court in the above-entitled case and that it constitutes the supplemental record on appeal herein.

Partial transcript, proceedings on appeal, Reporter's Transcript Oct. 6, 7, 1958.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of February, 1959.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ J. P. WELSH,
Deputy Clerk.

[Endorsed]: No. 16319. United States Court of Appeals for the Ninth Circuit. David Allen Parr, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: January 12, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 16319

DAVID ALLEN PARR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON
APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The denial of the claim for classification as a conscientious objector was without basis in fact and the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

II.

The appellant was illegally denied his right to have the use of the FBI report upon the trial to test and determine whether the resume of the FBI report sent to the appeal board was illegal because

it omitted favorable evidence appearing in the FBI report that Parr was a bona fide conscientious objector, notwithstanding the report of the hearing officer and the recommendation of the Department of Justice.

III.

The report of the Hearing Officer relied upon by the Department of Justice and the Appeal Board, and the recommendation of the Department to the Appeal Board are arbitrary, capricious and illegal because they refer to artificial, fictitious and unlawful standards not authorized by the Act and Regulations and were used by the Appeal Board to classify according to irrelevant and immaterial lines in determining that the defendant was not a conscientious objector when a pursuit of the Act and Regulations was the only thing for the Hearing Officer, the Department, and the Appeal Board to follow. Further, the report of the Hearing Officer relied upon by the Department of Justice and the recommendation of the Department relied upon by the Appeal Board were based upon and/or were tainted with suspicion and speculation.

IV.

The defendant was denied a fair hearing before the Appeal Board in that he was not given the following evidentiary material in time to use it before the Appeal board decision (or at any time): the full reports of the Federal Bureau of Investigation

concerning the defendant, and the full report of the Hearing Officer.

V.

The Government wholly failed to show that defendant refused to submit to induction in that he was not given the opportunities provided by the applicable regulations to go through the mandatory induction prerequisites at the induction station.

/s/ J. B. TIETZ.

[Endorsed]: Filed January 20, 1959.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16,319.

DAVID ALAN PARR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

APPELLANT'S OPENING BRIEF.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16,319.

DAVID ALAN PARR,
Appellant,

vs.

UNITED STATES OF AMERICA,
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

APPELLANT'S OPENING BRIEF.

This is an appeal from a judgment rendered and entered by the United States District Court for the Northern District of California, Southern Division. The appellant was sentenced to custody of the Attorney General for a period of one year (R. 13-14).^{*} Title 18, Section 3231, United States Code, conferred jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law (R. 16).

^{*}R. refers to the printed Transcript of Record.

STATEMENT OF THE CASE.

The indictment charged appellant with violation of the Universal Military Training and Service Act (R. 3-4). It was alleged that he became a registrant of the Selective Service System, and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order to submit to induction (R. 4).

Appellant pleaded not guilty, waived jury trial, was tried, convicted, and judgment was pronounced on October 7, 1958 (R. 12-14).

Defendant had subpoenaed the complete secret investigative report of the FBI, used by the Department of Justice and the complete report of the Department's Hearing Officer to the Department. Motion to Quash was granted by the trial court (R. 8). A written motion for judgment of acquittal was filed (R. 9). The motion was denied and defendant sentenced, as aforesaid. The motion contains all of the grounds that the Appellant relies upon for reversal of the judgment in this case (R. 9, 46).

THE FACTS.

Appellant was registered with the Selective Service System in 1951. He timely filed his Classification Questionnaire, November 13, 1951.** It showed (page 7) he was

**The exhibit (Government's) is the selective service file of appellant. The sheets are not consecutively paginated (as is ordinarily done by the clerks of the Local Boards) so reference to important documents will be made by the date of receipt, stamped thereon; page numbers of individual documents will be referred to when they exist.

a conscientious objector and (on page 3) he was a minister, regularly serving as such, and that he had been one of Jehovah's witnesses since August 10, 1941. This form also showed that he resided in the dormitory that is part of the headquarters of Jehovah's witnesses (page 2) and that all his time was devoted to work connected with the Watchtower Bible and Tract Society (page 4). He attached to this questionnaire form a three page letter, detailing his religious life and activities.

The local board called him in for an interview and, by a 3-0 vote classified him in Class IV-D (minister).

In September, 1953, he left the Brooklyn work and (by letter received on October 8) notified the local board of his new, Sacramento address, adding: "I am now working with the Sacramento California Central Unit of Jehovah's witnesses."

On March 16, 1954, he was asked by the local board for further information, on its mimeographed form. He filled this form out completely, and added the information that he had "left Bethel Family September 21, 1951" (the headquarter's dormitory).

In April, 1954, he was sent the Special Form for Conscientious Objectors (SSS Form No. 150). This he completed in great detail. He showed he believed in a Supreme Being; that he relied "upon Almighty God Jehovah and his son, Christ Jesus, for guidance"; that he spent many hours in bible study; that he believed in force only for self defense and then "not to the point of taking a life". He gave details of his religious training and gave name

and address references of individuals who knew of his conscientious objector and other religious beliefs and activities. He showed he had never been a member of any military organization.

Attached to this nationally used Special Form for Conscientious Objectors (SSS Form No. 150) was a two page mimeographed form with 12 additional questions. Appellant answered them in the spaces provided and attached two additional sheets of further information. The first of the 12 additional questions relate to ministry; the last five relate to conscientious objection. These latter five deal with use of force, with participation in "any war that he understands is authorized by Jehovah" and with whether the basis for his conscientious objections is his desire to preach or his unwillingness to use force, or on the views of the Watchtower Society, as expressed in certain named, published articles.

On July 12, 1954, the three local board members made an office memorandum for the file, reading:

"It appears registrant although he may be a minister is no longer devoting full and regular time and effort to ministry as prescribed by regulations because of full time secular work."

On July 12, 1954, he was reclassified in Class I-A (available for all military activity). He timely appealed.

On August 30, 1956, he appeared, by invitation, before the Hearing Officer of the Department of Justice and presented oral and written evidence to rebut the adverse evidence and misconceptions that had become known to him

by reason of the resume of the F.B.I. investigative reports furnished him.

The resume is in the file, and consists of five and one-half typewritten pages. All informants interviewed, and all material and facts referred to on the first five pages present a unanimous picture of excellent background, character, truthfulness and sincerity. The sixth page presents the beliefs of the sole "adverse" informant, namely, that:

registrant "failed to meet the requirement of a Bethel member," * * * "was immature in spiritual knowledge" * * * "was spiritually sick and a playboy" but concluded that he "*personally believed the registrant to be sincere in his claim of being a conscientious objector.*" (Emphasis supplied).

Appellant gave the Hearing Officer a "To Whom it May Concern" letter signed by aforesaid informant (M. A. Larson, Manager) dated September 12, 1953. This date is a week before appellant left the Bethel Home. This letter concludes that "He had an excellent attendance record and was of high moral standing. In view of these qualifications, he has our highest recommendation".

The resume contained no comment, by anyone, reflecting adversely on Parr's truthfulness or sincerity, or *conscientious objections to war*.

At the hearing before this Hearing Officer, he was asked the question, "Why can you not engage in such non-combatant service as caring for sick and wounded military personnel?" His response was, "The Bible prohibits a

Christian from taking any part in war. A noncombatant is just as guilty as a combatant. He is just like the guy who drives a car in a bank robbery—the driver is just as guilty as the one who holds up the bank. So it is with one who is a noncombatant—he is just as guilty as the one who shoots. It is the principle behind it. Taking care of the sick would be just the same as making bandages for the Red Cross or making bullets in a defense factory. As soon as the sick are patched up they are sent back to fight. Christ said that our ‘wars are not with carnal weapons as Christians are not of this world.’ Personally, I would care for sick and wounded people, but not in military hospitals because in so doing I would be spending my time in worldly things.” He elaborated, “my duty to the Government is to observe the laws as long as they do not conflict with God’s laws, such as paying taxes. It is really none of my business where the tax dollar goes. Christ said, ‘render under Caesar the things that are Caesar’s.’ ” (*sic*).

The Department sent an adverse recommendation to the Appeal Board, attaching a copy of the resume (but not the full F.B.I. reports) and in its letter of adverse recommendation made reference to the adverse attitude of the Hearing Officer, but did not attach or incorporate the text of the Hearing Officer’s report.

The Department’s letter of adverse recommendation stated that the handwritten answers on his Special Form for Conscientious Objectors “show a level of education and learning far below that appearing in the typewritten additions to his SSS Forms Nos. 100 and 150. It would seem

obvious that the registrant has had considerable help in the completion of his questionnaires. If so, this fact has not been indicated on these forms as required”.

At no other place does the file contain an attack on his candor.

At no place is there any showing that the Hearing Officer (or anyone) questioned him as to whether he had received help in answering forms or questions propounded.

As required by law, the Appeal Board sent him a copy of the Department's letter and gave him 30 days to comment.

On February 11, 1957, appellant timely wrote the Appeal Board a two page letter. Among other things, he commented: “I assure all of the answers are my own thoughts in my own choice of words”.

The Appeal Board retained him in the same I-A classification. The record shows there is no recording of whether the Appeal Board gave any consideration at all to his standing claim that he is a minister, or why it rejected his claim for a conscientious objector's classification. Thereafter, he was ordered to report for induction. He complied but refused to submit to induction, and was thereafter convicted for said refusal.

QUESTIONS PRESENTED AND HOW RAISED.

I.

Appellant presented written and oral evidence he was a minister and also was a conscientious objector. He was ultimately classified in neither of these classifications appropriate to his professions of fact.

The question presented was there a basis of fact for denying him one of the claimed classifications.

This question and the others raised herein, were presented by the Motion (R. 9) and by the Statement of Points (R. 46).

II.

A second question arose when the trial court quashed the subpoena issued by the defendant.

The question presented is whether appellant was illegally denied the use of the F. B. I. report, and other documents, to test whether the resume of it, and the reports and recommendations based thereon, were fair.

III.

A third question arose when it appeared, from the Exhibit, that the Appeal Board was advised to rely on the hearsay attributed to F. B. I. informant M. H. Larson, by the Department of Justice.

The question presented is whether an illegal basis for judgment was presented.

SPECIFICATION OF ERRORS.

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in quashing the defendant's subpoena.

III.

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT.

I.

The appellant made out a *prima facie* case for at least one of the conscientious objector classifications.

No basis in fact exists for denying him at least one of these classifications.

II.

The appellant should have had the opportunity to compare the F. B. I. reports with the resume furnished him to show that favorable information was withheld from the Appeal Board and from him.

III.

The advice given the Appeal Board, by its attorney (the Attorney General) was erroneous and prejudicial.

It was erroneous in that the principal issue for decision was the registrant's conscientious objections and the advice to not so classify him was based on a standard in no way applicable to this issue.

ARGUMENT.

I.

The Denial of the Claim for Classification As a Conscientious Objector Was Without Basis in Fact and the Recommendation of the Department of Justice and the Classification Given to Appellant by the Appeal Board Were Arbitrary, Capricious and Without Basis in Fact.

This point is involved in *Rogers v. United States*, No. 15647, February 2, 1959, Writ of Certiorari pending.

Appellant's brief in said Rogers appeal has been compared with particular concern to the facts involved in this case, and it is believed that if the Rogers decision is reversed, reversal in this appeal will follow.

A.

In any event, the facts concerning Parr's conscientious objections place him well within the boundaries already set by the Supreme Court and are readily distinguishable from Rogers. In the Rogers case the registrant, when he appeared before the Local Board, asserted " * * * that his

claim as a conscientious objector was based primarily upon his desire to preach * * *” (page 2 of slip opinion). Subsequently, and after he appeared before the Hearing Officer, he wrote the Appeal Board: “My claim for Exemption as a conscientious objector is based solely on the fact that I am a regularly ordained minister of the gospel.” (page 3 of slip opinion).

Nowhere in Parr’s record is there such a limited religious basis for his conscientious objections to war. As related in some detail in The Facts (*supra*) he set forth his religious life and activity and, with particularity, his beliefs with respect to taking life. See particularly his answer to the Hearing Officer’s question, *supra*. His religious basis for his conscientious objections was broad, not “solely” or even “primarily” like Rogers, on a desire to preach.

Thus, the only question is whether the *prima facie* case presented by him is rebutted by something else in the file.

The material that probably was considered “adverse” is that presented by one of the informants uncovered by the extensive F. B. I. investigation (see Resume of report, in Record). This man’s adverse statements, nevertheless, refer only to Parr’s qualifications for the *ministry*. They showed only that the informant considered Parr not up to the standard he believed was required for Bethel Family members: that he was “spiritually sick” and that he didn’t devote enough time to the ministry. The informant did not question Parr’s sincerity with respect to conscientious objection. In fact, this informant explicitly stated that he considered Parr a true conscientious ob-

jector. Therefore, the implied finding of insincerity (by the Selective Service System) to stand, must have something else as a basis.

The Attorney General believed Parr lacked integrity because of a supposed inconsistency between Parr's claim to full-time ministerial activity and the informant Larson's reference to Parr's failure to apply himself to bible study and preaching. There is no inconsistency here because Parr's claim of full-time ministerial activity was made in November, 1951 (See Classification Questionnaire, SSS Form No. 100, page 4, and also its three page supplement). There he showed he had been doing this full time work for seven months. The informant Larson's complaint, made to the F. B. I. in 1955, was obviously referring to the period preceding Parr's termination at Bethel, namely, the fall of 1953. It is submitted that a ministry neophyte's ardor, enthusiasm, devotion, etc., may wane and/or that other interests may crowd out or alter his earlier intentions and schedule of application to a rigid regimen, but that his conscientious objections to war are not thereby abandoned or even weakened.

The only other possibility that the record discloses is the speculation of the Attorney General's assistant (T. Oscar Smith) that the answers given by Parr in the various questionnaires show that he did not compose them without help and, by not disclosing this, was guilty of lack of candor. Such speculation is precisely what the Supreme Court condemned in *Dickinson v. United States*, 74 S. Ct. 152, 158:

“But when the uncontroverted evidence supporting a registrant’s claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.”

It is to be noted that neither the Hearing Officer nor any one ever asked him if he had help, and finally, that when he learned of this speculation, he wrote the Appeal Board, on February 11, 1957: “I assure all of the answers are my own thoughts in my own choice of words”.

B.

There is still another reason why no basis in fact exists for a I-A classification in the face of the record built by Parr.

He presented substantial evidence that he was a regular, and in fact, an ordained minister, and that the ministry was his vocation. His evidence was convincing, even to the draft board, for it classified him as a minister.

Thereafter he was declassified and the only new evidence was the following:

1. He was no longer a resident of Bethel;
2. He did secular work in California;
3. Mr. Larson didn’t consider him to be a good minister.

None of these, or all together, afford a firm basis for his declassification:

1. Residence in Bethel may be a good reason for classifying a registrant in Class IV-D, but non-residence is no bar to a registrant otherwise qualified. This should need no argument.

2. Almost the same can be said for the secular work in California. It is clear from the record that the major portion of his time at Bethel was in the press room; that "During the week (five and one-half days) my duties are exclusively at the headquarters, my evenings and week-ends are devoted to door-to-door preaching and congregational duties, as well as Bible research and study." (See Attorney-General's letter to Appeal Board, January 15, 1957; also see Exhibit A attached to it for a clarification of 5½ day duty, towit: "During this time he worked in the crew of our high speed web rotary magazine printing presses.")

When he returned to California did he devote a greater portion of his time to secular work? There is nothing in the record to suggest this, let alone show it.

Does a considerable amount of secular work disqualify a registrant for a IV-D classification? It didn't when he was classified in Class IV-D and it shouldn't, for the test should be vocation. True, it irks many local boards to consider a young man a minister, when he devotes less time to wholly clerical duties than do the ministers of the board members. But the courts should apply the correct standard. It is not too difficult a problem and this court early faced it in *Brown v. United States*, 216 F.2d 258, where a reasonable line was drawn, namely, that secular work to provide subsistence and defray expenses was no bar to being classified as a minister (259).

The most recent Court of Appeals decision on this phase of our subject is *Wiggins v. United States*, 5 Cir., 261 F.2d 113, Cert. denied March _____, 1959. Here it was held:

"We hold that a crane operator working a forty-hour week may be a minister in Jehovah's Witnesses and entitled to the ministerial exemption under the Selective Service Act, although spending only forty hours a month in religious duties." (119).

It is therefore concluded that we have here a case within Dickinson, *supra*, and the other decisions that require a reversal when no basis in fact exists for denying a registrant the conscientious objector classification.

II.

The Appellant Was Illegally Denied His Right to Have the Use of the F.B.I. Report upon the Trial to Test and Determine Whether the Resume of the F.B.I. Report Sent to the Appeal Board Was Illegal Because It Omitted Favorable Evidence Appearing in the F.B.I. Report That Parr Was a Bona Fide Conscientious Objector, Notwithstanding the Report of the Hearing Officer and the Recommendation of the Department of Justice.

What has been said in Point I above with respect to the effect on this appeal of a reversal in the Rogers appeal also applies to this point.

Since the point is a strictly legal one and does not involve a factual discussion, and since it was rejected, no argument will be presented on the principal feature of it

other than expressing a desire to preserve it, pending its ultimate disposition by the Supreme Court.

A feature of this point, distinguishing this case from Rogers', is the following: in Rogers' case, in each of the two final recommendations of the Department to the Appeal Board it is stated that all the evidence gathered by the F. B. I. is summarized in the resume (see page 41, Appellant's Opening Brief in Rogers).

In the instant case there is no such explicit or inclusive statement. Rogers was assured by the Department that all the favorable information was before the Hearing Officer. Parr has never been given even such an assurance. His only safety (and his conviction shows he needed it) was to have his subpoena honored.

III.

The Attorney General's Adverse Recommendation to the Appeal Board Was Arbitrary and Was Based on Artificial and Irrelevant Grounds Contrary to the Act and the Regulations.

The letter of January 15, 1957, from the Attorney General to the Appeal Board recommending that appellant be denied a conscientious objector classification recounted a number of bases for such rejection. Although we believe all of them unfair, we also believe it need not be shown that all are lacking in legal or factual basis. This, because the record does not show on what portion of the Attorney General's advice the appeal board relied. Our point, that a situation like this requires reversal of a conviction, was stated by this court in 1954, *Affeldt v. United States*, 218 F.2d 112 at 115.

We limit our task, therefore, to arguing that at least one basis presented to the Appeal Board was erroneous, as a matter of law.

The letter takes a whole page (p. 2) of single space typewriting to show that the registrant didn't meet the F. B. I. informant M. H. Larson's standard of what a resident minister at Bethel Home should be. It is important to note that nowhere during this page of discussion is any mention made of the opinion, also attributed to Larson: "and he personally believed the registrant to be sincere in his claim of being a conscientious objector." This statement is to be found only in the resume of the F. B. I. report.

Not only is this most relevant and apropos statement of Larson not to be found at the particular place where the Attorney General deals with the adverse opinions of Larson (which, as argued above, dealt solely with the ministry classification) on said page 2, but it is nowhere to be found in the body of the five page, single-spaced letter of the Attorney General. Doubtless this omission was not calculated with the thought that the Appeal Board members, unpaid volunteers, have too much to do when they meet to read all exhibits; almost certainly this omission was solely due to the zeal and ardor of a prosecution-minded advocate, proceeding with his eyes focused solely on supporting his adverse recommendation. It is recognized that there is a presumption that administrative officials do their duty and read everything in a file, but counsel has no hesitancy in going outside the record and stating that he is informed and believes that when the California Selective Service Appeal Board panels currently hold ses-

sions, they have been deciding only 50 cases an hour, compared to the 80 per hour decided during wartime. This is not to say that good consideration is not given to some, but is to say that there is no possible comparison of the time and attention given by the members of this administrative appellate body to the time and attention given judicial appellate cases.

In short, the M. H. Larson information discussed on page two of the said letter could well have been a chief or even the sole basis used by the Appeal Board.

Finally, this court, in addition to *Affeldt, supra*, condemned a determination where it appeared that "the appeal board may have accepted the erroneous advice of the Department of Justice * * *". See *United States v. Batelaan*, (1954) 217 F.2d 946, last paragraph. Other courts have followed this salutary principle in criminal cases, and one not citing *Batelaan* or *Affeldt* is *United States v. Erikson*, S.D. N. Y., 1957, 149 F. Supp. 576.

CONCLUSION.

The judgment of conviction should be reversed.

Respectfully submitted,

J. B. TIETZ,

Attorney for Appellant.

April 29, 1959.

No. 16,319

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID ALAN PARR,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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No. 16,319

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DAVID ALAN PARR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked by appellant under Title 18 United States Code, Section 3231 and Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted on May 1, 1958 for violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a), in that he knowingly refused to submit himself to induction (Tr. 3-4). He pleaded not guilty, waived jury trial (Tr. 7-8), and was tried by the Honorable Michael J. Roche

on October 6, 7 and 8, 1958. Appellant thereafter was adjudged guilty (Tr. 13) and on October 8, 1958 was sentenced to a term of one year (Tr. 14). Prior to the adjudication of guilty, the trial court granted appellee's motion to quash service of a subpoena for the reports of the Federal Bureau of Investigation together with a report of the Hearing Officer of the Department of Justice (Tr. 9) and denied the appellant's motion for judgment of acquittal (Tr. 13). Appeal was made to this court from the judgment of conviction (Tr. 16).

STATEMENT OF FACTS.

Appellant first registered with Selective Service on May 7, 1951 and gave his date of birth as April 17, 1933.¹

Appellant's Classification Questionnaire was filed with his Local Board on November 13, 1951. On page 3 of the questionnaire, appellant stated that he was a minister of religion regularly serving with the Jehovah's Witnesses Sect. He further stated that he was not a student preparing for the ministry. On page 4 of the questionnaire, appellant stated he had

¹The following Statement of Facts is based on appellant's Selective Service file which was appellee's Exhibit No. 1 in evidence in the court below. Inasmuch as all pages of the Exhibit are contained in chronological order and according to date, reference will not be made to any identification numbers contained in the file. Wherever possible, the description and date of the particular document mentioned will be set forth for the purpose of identification in this brief.

been a Pioneer Minister since November of 1948, and since 1951 a member of the Bethel Family and Headquarters Staff of the Watchtower Society. Appellant on page 7 of the questionnaire stated he was conscientiously opposed to participation in war of any form.

On February 25, 1952, appellant was classified 4-D by the Local Board. On October 8, 1953, the Local Board received a letter from the defendant notifying it of the defendant's change of address and stating "I am now working with the Sacramento, California Central Unit of Jehovah's Witnesses." On March 29, 1954, the Local Board received information from appellant indicating that he had left his employment with the Bethel Family on September 21, 1953. A questionnaire received by the Local Board on April 14, 1954, contained the information that appellant was earning a living by accepting any jobs available and performing seasonal farm labor work. He further stated that he was conducting public preaching for about ten hours a month. On July 12, 1954, the Local Board classified appellant 1-A.

The Selective Service file of appellant contains a letter directed to the Board dated July 24, 1954 in which appellant appealed his 1-A classification and stated that he expected to be able to go back as a full-time minister at some future date. As stated, the classification of 1-A was appealed and appellant's case was referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objection claim.

On January 15, 1957, T. R. Smith, Chief, Conscientious Objector Section, Department of Justice, stated that the Department concurred in the determination of the Hearing Officer that the registrant was insincere in his conscientious objection to participation in combatant and non-combatant service and recommended to the Appeal Board that the appeal be not sustained. According to the Department of Justice's letter of January 15, 1957, the registrant, when he appeared before the Hearing Officer, stated he found no objection to the resumé of the reports of the Federal Bureau of Investigation other than the reference to him as a "playboy." The Department's letter noted, as set forth on pages 5 and 6 of the resumé, that appellant was requested to leave the Bethel Home because of his "playboy" activities. Appellant also advised the Hearing Officer, according to the Department's letter, that he would not accept a classification of 1-O (conscientious objector classification) because "... it would mean working for the government ..."

Considering the entire Selective Service file of the registrant, the Department of Justice concluded that there was a substantial question as to the registrant's integrity, veracity and sincerity. On February 28, 1957, the Appeal Board classified appellant 1-A. On March 19, 1957, appellant was ordered to report for induction at the Induction Station, New York City on April 1, 1957. The Selective Service file of appellant, however, contains an Order for Transferred Man to Report for Induction dated April 18, 1957, indicating that at appellant's request, he was ordered

to report on April 25, 1957 at Sacramento, California, for induction. Appellant reported to the Induction Station as ordered, and on April 25, 1957 refused induction into the armed forces and thereafter was indicted for such failure to submit to induction.

It was stipulated at the trial that although ordered to report for induction, appellant refused (Tr. 19). It was further stipulated that a certified photostatic copy of the Selective Service file of appellant be marked and introduced as Government's Exhibit No. 1 in evidence in place of the original file and without calling the Draft Board Clerk to identify the file. (Tr. 18). Although appellant argued that he did not understand the nature of the induction ceremony, witnesses for the government as well as appellant himself on cross-examination indicated that appellant understood the induction ceremony and the consequences for failing to submit to induction (Tr. 25-43).

QUESTIONS INVOLVED.

1. Was there a basis in fact for appellant's classification of 1-A by the Appeal Board?
2. Was the defendant entitled to subpoena the Federal Bureau of Investigation reports upon which the resumé used by the Department of Justice was based?

STATUTE INVOLVED.

The statute involved is set forth in the Appendix.

ARGUMENT.

I. THE APPEAL BOARD HAD BASIS IN FACT FOR DENYING APPELLANT EXEMPTION AS A CONSCIENTIOUS OBJECTOR, A CLASSIFICATION OF 1-O.

Appellant complains that the denials of a conscientious objector status, a classification of 1-O, by the Appeal Board and by the Department of Justice, in its recommendation to the Appeal Board, were without basis in fact and were arbitrary, capricious and contrary to law.

There has been in the past much litigation as to what constitutes a claim for classification as a conscientious objector, and what circumstances reflected in a registrant's file justify a Selective Service board in denying such a claim. In other words, what evidence or basis in fact would permit a board to deny a claim of conscientious objection?

The courts have drawn a distinction, since the case of *Dickinson v. United States*, 346 U. S. 389 was decided, as to the susceptibility of proof between a claim for ministerial status and a claim of conscientious objection. While the question of whether a registrant is a minister may be a factual one susceptible of exact proof by evidence, the best evidence of conscientious objection is not the registrant's assertions or those of his associates, but his sincerity, good faith, credibility and demeanor.

Witmer v. United States, 348 U. S. 375;

White v. United States, (9th Cir.) 215 F. 2d 782, Cert. den., 348 U. S. 970;

Tomlinson v. United States, (9th Cir.) 216 F. 2d 12, Cert. den., 348 U. S. 970;

Shepherd v. United States, (9th Cir.) 217 F.
2d 942, 220 F. 2d 885;

Campbell v. United States, (4th Cir.) 221 F.
2d 454.

The Supreme Court in *Witmer v. United States*, supra, confronted with the issue of what constituted a basis in fact for denial of a conscientious objector claim, held that any fact which casts doubt on the sincerity of the registrant is relevant in such cases, and is "affirmative evidence" that the registrant has not painted a complete and accurate picture. The court therefore held that the ultimate question is the sincerity of the registrant.

The court stated at pages 381 and 382 the following:

"Here the registrant cannot make out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant. It is 'affirmative evidence . . . that a registrant has not painted a complete or accurate picture . . .'
Dickinson v. United States, supra, p. 396."

The court further decided that a registrant claiming successive deferments on different grounds and making inconsistent statements concerning his claim of conscientious objection creates considerable doubt

as to the sincerity of his claim and provides a basis in fact for the denial thereof.

This court, in September 1954, prior to the Supreme Court decision of *Witmer v. United States*, supra, had occasion to decide the two cases of *White v. United States*, (9th Cir.) 215 F. 2d 782, cert. den., 348 U. S. 970, and *Tomlinson v. United States*, (9th Cir.) 216 F. 2d 12, cert. den., 348 U. S. 970, which clarified and set forth what standards may be considered in denying a claim of conscientious objection. In *White v. United States*, supra, this court pointed out that, in the determination of a registrant's belief and his sincerity therein, the best evidence on the question may well be his credibility and demeanor in a personal appearance before the local boards of the Selective Service System. In holding that the Appeal Board may take into consideration the fact that the Local Board had made a classification following its opportunity to observe the registrant's demeanor during his personal appearance, this court stated at pages 784 and 785:

“The question before the local board had to do not with what religious organization or sect the appellant adhered to, nor what the teachings of that sect or organization was, but what was the sincere belief of this particular registrant and what was the extent of his conscientious opposition to military service. In other words, the local board initially, and the appeal board subsequently, were called upon to evaluate a mental attitude and belief. It is plain that when such matters are to be determined and passed upon, the atti-

tude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as to the extent and quality of his beliefs. The local board, before whom the registrant appeared, had an opportunity surpassing that available to us or to the appeal board itself to determine and judge as to these matters.”

Tomlinson v. United States, supra, holds that an Appeal Board may rely on the recommendation of the Department of Justice concerning a registrant’s sincerity as a primary basis in fact for denying the claim of conscientious objection. This court stated at page 17:

“In this instance it is plain that the appeal board’s conclusion was based primarily upon the report of the hearing officer. Such a report may furnish the basis in fact which supports the board’s action. *Kent v. United States*, 9 Cir. 207 F. 2d 234, 237; *Roberson v. United States*, 10 Cir. 208 F. 2d 166, 169. Its conclusions may also have been based in part upon that portion of the registrant’s file which was transmitted with the appeal.”

In addition, the court pointed out that objection to any governmental service is not an objection which the act recognizes and reflects directly upon the registrant’s sincerity. The court stated at page 18:

“The appeal board may well have been of the view that this registrant is primarily an objector who will have nothing to do with the affairs ‘of this world.’ True he is conscientiously opposed

to killing; but his real objection to noncombatant service would appear to be its interfering with his carrying 'the message' and doing what he chose to call 'ministerial work.' We think that in drawing the line where it did, it cannot be said that the appeal board acted without basis in fact."

Thus, the Supreme Court, as well as this court, has held that the best evidence upon the question as to what a registrant claiming conscientious objection may believe or feel, is not his assertion or those of his associates, but his credibility and demeanor in personal appearances before the fact finders, the Local Board, and the Department of Justice Hearing Officer. Furthermore, an Appeal Board may rely for a basis in fact in denying a conscientious objector claim upon the report of the Hearing Officer forwarded through the recommendation of the Department of Justice, as well as the entire file of the registrant transmitted on appeal.

The most recent case from this district directly involving this issue is *Selby v. United States* (9th Cir.) 250 F. 2d 666, where the court quoted at length from *Witmer v. United States* and affirming again the rule of the above cases. See also *Borisuk v. United States* (3rd Cir.) 206 F. 2d 338.

In this case there are numerous factors, any one of which could supply a basis in fact for the denial of the Conscientious Objector classification. Since in these cases the sincerity of the applicant is the essen-

tial point, his demeanor before the Hearing Officer and the conclusion of the Hearing Officer who saw him at length, are most relevant. The Hearing Officer concluded that the appellant was not sincere and it would seem that this court should be most reluctant to overturn such a finding.

Another basis in fact for the denial of this claim is the credibility, as well as the sincerity, of the appellant. If, as the Local Board, the Hearing Officer, and the Appeal Board believed, the appellant had not answered his questionnaire frankly by failing to state on page 7 of his questionnaire that another person aided him in the preparation of his statement, the credibility of the appellant would be seriously impaired. In view of his subsequent statement in his answer to the "Recommendation of the Department of Justice to the Appeal Board," dated February 11, 1957, "I assure you all of the answers are my own thoughts, in my own choice of words," it would seem that the Board was more than justified in concluding that not only was the credibility of the appellant doubtful, but that he had, to be blunt, lied to the Board, and that he had received great amounts of help.

A comparison of the "Statement of David A. Parr in Support of Claim as Minister of Religion" attached to his questionnaire, dated November 10, 1951, with the handwritten and printed "Special Form for Conscientious Objectors," dated April 2, 1954, reveals that while the former is well written and flawlessly typed, the latter spells witnesses with two "t's" twice,

spells guidance "guidence," and spells sincerely "sincerley." Furthermore, although Jehovah's Witnesses is always spelled with an apostrophe throughout his typed material, the possessive form is used incorrectly approximately half of the time in the written material. Again, just 3 pages after the end of the "Special Form for Conscientious Objectors," on another form in answer to the question of how many hours appellant worked, appellant wrote "They varies from 6 to 12." On the page after this the appellant again spells witness with two "t's."

Yet another basis in fact which might have caused the Board to doubt the appellant's veracity, was his failure to live up to Instruction 5 on his original Selective Service System Classification Questionnaire. This Instruction states that "After this questionnaire has been returned, report to your local board at once any change of address, any change in place of employment or occupation, or *any other new fact which may affect your classification.*" (Emphasis supplied.) Certainly, the appellant must have known that the fact he was no longer fully occupied with the Bethel Home and its religious work might have influenced his Draft Board. Instead appellant merely filed a Change of Address Notice stating "I am now working with the Sacramento, California Circulation Unit of Jehovah's Witnesses." The implication here was that the appellant, though no longer at the Home, was performing the same type of work in Sacramento. In fact, of course, the appellant had been dismissed from the Home for being a "playboy" and was no longer

engaged anything like full time in ministerial activities. It should be noted here that appellant's Change of Address was mailed after the day he would have graduated from the Bethel School so that his Draft Board would have no notice of any kind that the appellant had not graduated and proceeded on to full time ministerial activities.

The last basis in fact for denying appellant's Conscientious Objector Classification is that the sincerity of the appellant is reflected upon adversely when, after his statements that "Here my entire time and life are devoted to the ministry, no time being spent in any secular work. During the week (five and one-half days) my duties are exclusively at the headquarters, my evenings and week-ends are devoted to door-to-door preaching and congregational duties, as well as Bible research and study," he was dismissed for being "spiritually sick" and a "playboy".

As the resumé of the Federal Bureau of Investigation reports, a Federal Bureau of Investigation informant further told the Federal Bureau of Investigation that on many occasions he had verbally strongly reprimanded the registrant with the hope that the registrant would correct himself. The informant further stated that the registrant failed to right himself and that under his direct orders, the registrant was requested to leave the staff of the Bethel family of Brooklyn . . . He also pointed out that since the registrant had failed to devote the necessary amount of time in his ministerial work, he was removed from the Pioneer list.

Appellant alludes in his brief to the argument that a 4-D, or Ministerial, classification was the only proper one here. Appellant cites the case of *Wiggins v. United States* (5th Cir.) 261 F. 2d 113 as supporting this proposition. First of all, the *Wiggins* case is not and never has been the law in this Circuit. See *Reese v. United States* (9th Cir.) 225 F. 2d 766. Furthermore, in the *Wiggins* case, the court was concerned with the deferment of a man who was a leader in the Jehovah's Witnesses, in charge of a whole area (page 118) even though he, like defendant, was engaged "full time" in secular employment. Furthermore, the Hearing Officer stated that "no one has appeared before him who impressed him with his uprightness, his fine character, and with his genuine sincerity and truthfulness" (page 117) more than *Wiggins*. Compare this with the case of the appellant who was asked to leave a ministry school because he was a "playboy" and "spiritually sick." Moreover, as the foregoing makes clear, there is ample reason for the Board here to doubt the appellant's sincerity. In *Wiggins*, the Draft Board, as the court pointed out numerous times, built no record of any kind and had no reason to doubt any of the defendant's statements.

II. THE FEDERAL BUREAU OF INVESTIGATION REPORTS WERE PROPERLY DENIED THE APPELLANT WHERE HE WAS FURNISHED WITH A FAIR RESUME THEREOF.

Appellant recognizes that this argument is foreclosed by *Rogers v. United States* (9th Cir.) 263 F.

2d 683. In addition to the *Rogers* case, the following cases hold directly against the appellant's view:

Blalock v. United States (4th Cir.) 247 F. 2d 615;

Kaline v. United States (9th Cir.) 235 F. 2d 54;

White v. United States (9th Cir.) 215 F. 2d 782.

III. THERE IS NO ERROR IN THE RECORD BEFORE THE APPEAL BOARD.

Although appellant cites cases in which the Department of Justice affirmatively misled the Appeal Board on questions of law, (see *Affeldt v. United States* 218 F. 2d 112; *Bateman v. United States* 217 F. 2d 946) the sole ground here is that the Department of Justice did not include something in its letter which was included in the fair resumé of the Federal Bureau of Investigation report. In view of the fact that this resumé was also available to the Appeal Board, appellant is forced to rely on the theory that perhaps the Appeal Board did not read the resumé. We submit that this argument borders upon the frivolous. The fact that the Appeal Board members are unpaid volunteers in no way supports inference that they did not consider all material before them. As appellant's counsel states, he "has no hesitancy in going outside the record and stating that he is informed and believes . . ." We believe that the above shows the insubstantiality of appellant's position.

CONCLUSION.

For the above reasons, the United States submits that no error has been shown in the conviction of appellant. He has received a fair trial and was properly convicted. A clear, convincing and substantial basis in fact existed for the classification of 1-A of appellant by the Appeal Board.

The judgment should be affirmed.

Dated, San Francisco, California,

June 14, 1959.

LYNN J. GILLARD,

United States Attorney,

DONALD B. CONSTINE,

Assistant United States Attorney,

JOHN KAPLAN,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTE

Section 6(j), Universal Military Training and Service Act, 50 U.S.C. App. 456(j) provides:

Conscientious objectors. Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any

such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to non-combatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12

of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

No. 16323 ✓

United States
Court of Appeals
for the Ninth Circuit

AUGUSTINA SEIJO, as Executrix of the Estate
of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS, Et Al.,

Appellees.

Transcript of Record

FILED

APR -1 1959

Appeal from the United States District Court for the
Southern District of California
Southern Division.

PAUL P. O'BRIEN, CLERK

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For Appellee Donald L. Hobbs, et al.



In the United States District Court, Southern
District of California, Southern Division

In Admiralty—No. 1976-SD-C

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a National Banking Association,

Libelant,

vs.

OIL SCREW SUN KING, Her Engines, Tackle,
Apparel and Furniture; DONALD L. HOBBS;
JOSEPH N. POMBO; JOSEPH MAR-
CHANT; GILBERT D. MARCHANT; MAN-
UEL G. MARCHANT; HARRY S. GARCIA;
JUAN SEIJO; FRANK P. RODRIGUES;
JOHN FARINHA; FRANCISCO S.
JARDIM; CARMEN SEIJO; MARIA TEIX-
ERIA; MANUEL JOSEPH FERNANDES;
MARGARET MADRUGA; MANUEL P.
AMARAL; AUGUST R. LUIS, JR., and
MARIANA F. LUIS,

Respondents.

LIBEL OF FORECLOSURE OF PREFERRED
SHIP MORTGAGE AND FOR MONIES DUE

To the Honorable Judges of the United States Dis-
trict Court for the Southern District of Cali-
fornia:

The libel of Security-First National Bank of Los
Angeles, a national banking association, libelant,
against the Oil Screw Sun King, her engines, tackle,

apparel and furniture, and Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel [2*] G. Marchant, Harry S. Garcia, Juan Seijo, Frank P. Rodrigues, John Farinha, Francisco S. Jardim, Carmen Seijo, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, respondents, in a cause civil and maritime of foreclosure of a preferred mortgage on said vessel and for monies due, alleges:

I.

The libelant at all times hereinafter mentioned was and is a national banking association with its principal place of business in the City of Los Angeles, State of California, in the Southern District of California.

II.

The Oil Screw Sun King is now, or during the currency of process herein will be, within the Southern District of California and within the jurisdiction of this Court. Upon information and belief that the respondents, Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Juan Seijo, Frank P. Rodrigues, John Farinha, Francisco S. Jardim, Carmen Seijo, Maria Teixeria, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, and each of them, are residents of the State of California and subject to the process of this Court.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

III.

On June 27, 1951, said Oil Screw Sun King was owned by the respondents, Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Juan Seijo, Frank P. Rodrigues, John Farinha, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, who on that day executed a promissory note in words and figures as follows: [3]

“Mortgage Note

\$145,000.00

San Diego, California

June 27, 1951

For Value Received, we, as principals, promise to pay in lawful money of the United States of America to the order of Security-First National Bank of Los Angeles, at its office in Westwood Village, Los Angeles, California, the principal sum of One Hundred Forty-five Thousand and no/100 Dollars (\$145,000.00), with interest on the unpaid balance thereof at the rate of four and one-half per cent ($4\frac{1}{2}\%$) per annum from date until paid. Said principal sum and interest shall be paid as follows:

Twenty-nine Thousand and no/100 Dollars (\$29,000.00) or more, and interest, on the 27th day of June, 1952, and Twenty-nine Thousand and no/100 Dollars (\$29,000.00) or more, and interest, on the

27th day of each and every June thereafter until the 27th day of June, 1956, on which date the entire balance of principal and interest then unpaid shall become due and payable.

If the interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of principal or interest when due or in the carrying out of or performing of any of the terms and conditions of the mortgage given to secure the payment of this note, then the entire unpaid principal of this note, together with interest due thereon, shall immediately become due and payable at the option of the holder hereof.

In addition to the payments hereinabove provided, we, as principals, promise to pay in lawful money of the [4] United States of America to the order of the Payee Seventy-five (75) per centum of the net proceeds from the sale of the vessel's share of the fishing catch of the vessel Sun King so long as any portion of the indebtedness secured by the mortgage executed as collateral for this note remains unpaid. Such proceeds shall be paid to the Payee promptly when received, and shall be applied first against the next maturing installment on account of principal and interest due under this note and then, after payment in full of such installment and interest, the excess, if any, of such proceeds shall be applied on account of the last maturing installment of such principal.

Makers or endorsers and guarantors hereby waive presentment, demand, protest and notice of dishonor and agree to remain bound for payment of this obligation, notwithstanding any extension of time, substitution or release of security or any other indulgence granted, the makers hereby waiving notice of such extension, substitution or other indulgence.

The makers hereof consent to a deficiency judgment on the above debt with the intent that the same shall be paid in full, irrespective of the amount of the realization of the security given herefor.

This note is secured by a First Preferred Ship's Mortgage upon the vessel "Sun King," Official No. 253 028. If said vessel becomes a total loss or a constructive total loss (English Rule), all unpaid principal and accrued interest thereupon shall, at the option of the holder hereof, become immediately due and payable.

The liability upon this note shall be joint and several. [5]

The pleading of any statute of limitations as a defense to any and all obligations hereunder is hereby waived.

The undersigned further promise to pay all cost of collection, including attorney's fees, which may be incurred in the collection of this note.

In event this note is paid prior to maturity from funds received as a result of refinancing through a lending institution other than Payee, there shall be

paid to Payee, in addition to the amount due, including interest, ninety (90) days' interest on the balance due at the time of the prepayment.

/s/ FRANK P. RODRIGUES;

/s/ MARGARET MADRUGA;

AUGUST R. LUIS,

By /s/ MARGARET MADRUGA,
His Attorney-in-Fact;

JOSEPH MARCHANT,

By /s/ JOSEPH N. POMBO,
His Attorney-in-Fact;

GILBERT D. MARCHANT,

By /s/ JOSEPH N. POMBO,
His Attorney-in-Fact;

MANUEL G. MARCHANT,

By /s/ JOSEPH N. POMBO,
His Attorney-in-Fact;

/s/ JOSEPH N. POMBO;

/s/ JOHN FORINHA;

MANUEL P. AMARAL,

By /s/ MARGARET MADRUGA,
His Attorney-in-Fact;

MARIANA F. LUIS,

By /s/ MARGARET MADRUGA,
Her Attorney-in-Fact;

DONALD L. HOBBS,

By /s/ JOSEPH N. POMBO,
His Attorney-in-Fact;

HARRY S. GARCIA,

By /s/ JOSEPH N. POMBO,
His Attorney-in-Fact; [6]

JUAN SEIJO,

By /s/ JOSEPH N. POMBO,
His Attorney-in-Fact;

MANUEL JOSEPH
FERNANDES,

By /s/ JOSEPH N. POMBO,
His Attorney-in-Fact;

/s/ MARIA TEIXEIRA."

Said promissory note was delivered to libelant, the payee thereof, on or about June 27, 1951. A true copy of said promissory note is attached hereto and made a part hereof as Exhibit "A."

That thereafter, on the 23rd day of July, 1951, Francisco S. Jardim, one of the respondents herein,

assumed liability herein on said note in accordance with a written instrument of assumption of liability, a true copy of which is attached hereto and made a part hereof as Exhibit "B."

That thereafter, on the 27th day of November, 1951, Carmen Seijo, one of the respondents herein, assumed liability herein on said note in accordance with a written instrument of assumption of liability, a true copy of which is attached hereto and made a part hereof as Exhibit "C."

IV.

In order to secure the payment of said note, said respondents duly executed and delivered to libelant, as mortgagee, a preferred mortgage of said vessel, dated June 27, 1951, a true copy of which is attached hereto and made a part hereof as Exhibit "D."

V.

At the time said preferred mortgage was executed, said vessel was, and still is, duly registered under the laws of the United States of America, at its home port of San Diego, California. [7]

VI.

Said preferred mortgage was duly recorded in the office of the Collector of Customs at the Port of San Diego, the home port of said vessel, in Liber B-2/7 of Mortgages, folio 46, at 9:35 o'clock a.m. on June 27, 1951, in accordance with Section 30, subsection C, of the Merchant Marine Act of 1920.

All of the acts and things required to be done by the Merchants Marine Act of 1920 in order to give said mortgage the status of a preferred mortgage were duly done or caused to be done by libelant or by the Collector of Customs of the Port of San Diego.

VII.

That on June 15, 1954, libelant and respondents, and each of them, executed an Assignment of Fishing Contract and Boat's Shares with Extension Agreement wherein it was provided, among other things, that in consideration of the within assignment and agreement, it was understood and agreed that the terms of payment of the mortgage promissory note (Exhibit "D" hereof) were modified so that said note would thereafter be payable as follows, to wit:

\$29,000.00 on June 27, 1955, and the balance of the principal on June 27, 1956, together with interest at the rate of $4\frac{1}{2}\%$ per annum, payable annually on June 27th of each year.

That said payments have not been made, notwithstanding demand having been made by libelant upon respondents therefor, and there is now due, owing and unpaid from said respondents to libelant the principal sum of \$57,723.89 by reason of said promissory note, and the said respondents are in default of payment thereof. Interest on said sum is likewise due, owing and unpaid from said respondents to libelant, at the rate of $4\frac{1}{2}\%$ per annum from June 27, 1955. [8]

VIII.

That it is provided in said note that in case of any default in the payment thereof, the makers agree to pay all costs of collection thereof, including a reasonable sum as attorney's fees; that the sum of \$3,500.00 is a reasonable sum for the fees of libellant's proctors in the above-entitled action.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libellant prays:

1. That process in due form of law according to the rules and practice of this Court in causes of admiralty and maritime jurisdiction may issue against said Oil Screw Sun King, her engines, tackle, apparel and furniture, and that all persons having any interest therein may be cited to appear and answer under oath, all and singular, the matters aforesaid.

2. That citation in personam may issue against respondents, Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Juan Seijo, Frank P. Rodrigues, John Farinha, Francisco S. Jardim, Carmen Seijo, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, and that

they be required to appear and answer under oath all and singular the matters aforesaid.

3. That libelant have judgment in personam against respondents in the amount of \$57,723.89, plus interest thereon from June 27, 1955, at the rate of 4½% per annum, until paid, together with libelant's costs and reasonable attorney's fees in the sum of \$3,500.00. [9]

4. That said preferred mortgage be foreclosed and said Oil Screw Sun King be condemned and sold and the proceeds thereof applied in payment of said claims and demands, pursuant to law.

5. That libelant have such other and further relief in the premises as in law and justice it may be entitled to receive.

LILLICK, GEARY, McHOSE,
ROETHKE & MEYERS,

WILLIAM A. C. ROETHKE,

By /s/ WILLIAM A. C. ROETHKE,
Proctors for Libelant.

Duly Verified.

[Endorsed]: Filed January 4, 1957. [10]

In the United States District Court, Southern
District of California, Southern Division
In Admiralty No. 1976-SD-C

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a National Banking Association,
Libelant,

vs.

OIL SCREW SUN KING, Her Engines, Tackle,
Apparel and Furniture; DONALD L. HOBBS;
JOSEPH N. POMBO; JOSEPH MAR-
CHANT; GILBERT D. MARCHANT; MAN-
UEL G. MARCHANT; HARRY S. GARCIA;
JUAN SEIJO; FRANK P. RODRIGUES;
JOHN FARINHA; FRANCISCO S.
JARDIM; CARMEN SEIJO; MARIA TEIX-
ERIA; MANUEL JOSEPH FERNANDES;
MARGARET MADRUGA; MANUEL P.
AMARAL; AUGUST R. LUIS, JR., and
MARIANA F. LUIS, Respondents.

J. T. SILER; STAR-KIST FOODS, INC.; SAN
DIEGO MARINE CONSTRUCTION COM-
PANY, and RAYTHEON MANUFACTUR-
ING COMPANY, Intervenor.

INTERLOCUTORY DECREE ESTABLISHING
VALIDITY, PRIORITY AND AMOUNTS OF
CLAIMS, FORECLOSING PREFERRED
SHIP'S MORTGAGE AND AWARD OF AT-
TORNEY'S FEES

Security-First National Bank of Los Angeles, a
national banking association, having filed its libel

herein on the 4th day of January, 1957, to foreclose a certain preferred mortgage on the [49] Oil Screw Sun King, her engines, tackle, apparel and furniture in which said libel process was prayed against the said Oil Screw Sun King, her engines, etc., as well as process in due form of law against the respondents, Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Juan Seijo, Frank P. Rodrigues, John Farinha, Francisco S. Jardim, Carmen Seijo, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, citing them to appear and answer;

And a monition having issued, in accordance with the prayer of the libel and the practice of this Court, to the Marshal of this Court, commanding him to attach and seize the said vessel, and actual notice of the commencement of the suit having been given to the person in charge of said vessel, to wit: Donald L. Hobbs, managing owner of the O. S. Sun King, by the Marshal of this Court on January 8, 1957, as provided by Subsection K of Section 30 of the Merchant Marine Act of 1920, and the Marshal having made his return of said monition, that in obedience thereto he has attached the said vessel and given due notice to all persons claiming the same, that this Court would on the 28th day of January, 1957, proceed to the trial and condemnation thereof should no claim and answer be interposed therefor, which return has been filed, and the usual proclamation

having been made and the respondents, and each of them named herein, having appeared and filed an answer, and the defaults of all non-appearing parties having been entered;

And it appearing that San Diego Marine Construction Co., a California corporation; Raytheon Manufacturing Company, a Delaware corporation; J. T. Siler, d/b/a J. T. Siler Company, and Star-Kist Foods, Inc., a California corporation, having filed intervening libels herein; and it further appearing that no notices [50] of liens have been filed with the Office of the Bureau of Customs, District of San Diego, California;

And it appearing that on June 27, 1951, said Oil Screw Sun King was owned by the respondents, Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Juan Seijo, Frank P. Rodrigues, John Farinha, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, who on that day made, executed and delivered a promissory note to Security-First National Bank of Los Angeles, libelant, in the amount of \$145,000.00, with interest at the rate of $4\frac{1}{2}\%$ per annum, with the principal sum and interest payable as follows: Twenty-nine Thousand and no/100 Dollars (\$29,000.00) or more, and interest, on the 27th day of June, 1952, and Twenty-nine Thousand and no/100 Dollars (\$29,000.00) or more, and interest, on the 27th day of each and every June thereafter until

the 27th day of June, 1956, on which date the entire balance of principal and interest then unpaid shall become due and payable, together with all costs of collection thereof, including a reasonable sum as attorney's fees;

And it further appearing that in order to secure payment of the principal of said note with interest on the amount evidenced thereby, the respondents, Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Juan Seijo, Frank P. Rodrigues, John Farinha, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, duly executed and delivered to libelant, as mortgagee, a preferred mortgage on the O. S. Sun King, her engines, etc., dated June 27, 1951, as more particularly set forth in the libel herein;

And it further appearing that all of the terms and [51] provisions of the Ship Mortgage Act of 1920 were complied with in respect to said mortgage, and it further appearing that the total amount of \$57,723.89 is still due and unpaid, with interest thereon from thereon from June 27, 1955, and that the non-payment of installments from June 27, 1955, and interest thereon, constitute a default under the terms of said preferred mortgage; and it further appearing that libelant, as mortgagee, acting pursuant to the provisions of the said mortgage and note has duly declared the entire balance on the principal sum to be immediately due and payable

with interest thereon at the rate of $4\frac{1}{2}\%$ per annum, until paid;

And it further appearing that on the 23rd day of July, 1951, Francisco S. Jardim, one of the respondents herein, assumed liability herein on said note and mortgage in accordance with a written instrument of assumption of liability, a true copy of which is attached to the libel herein; and that thereafter, on the 27th day of November, 1951, Carmen Seijo, one of the respondents herein, assumed liability herein on said note and mortgage in accordance with a written instrument of assumption of liability, a true copy of which is attached to the libel herein; and it further appearing from the preferred mortgage that such sums advanced by libellant as mortgagee to preserve and maintain the vessel and insurance thereon, as a result of mortgagors' defaults, should be added to the principal amount due;

And hearings on the validity, priority, amounts due and defenses to the same, if any, of the claims under the libel and intervening libels herein, and the answer of respondents to same, having been held on February 25, 1957, and April 22, 1957, and all parties being represented by counsel, and testimony, both oral and documentary, having been received; and

It further appearing that there is aboard the Oil Screw [52] Sun King a fathometer, the property of Raytheon Manufacturing Company, under a lease

agreement with title reserved to the said Raytheon Manufacturing Company, which reserved title is admitted and acknowledged by the parties hereto and their proctors; and

It being now determined that respondents herein, and each of them, are in default under the note and mortgage hereinabove described and that the principal amount of the said note, interest thereon, and advances by libelant for preservation of the vessel and for insurance thereof, together with reasonable attorney's fees, is now due, owing and payable by respondents, and each of them, to libelant;

And an order for a Writ of Venditioni Exponas having issued on April 22, 1957, that the O. S. Sun King, her engines, etc., be condemned and sold on May 3, 1957, at 2:00 o'clock p.m. of said day, to answer the prayer of the libel;

And the County of San Diego having filed herein a Petition for Payment of Tax Claim from Proceeds of Sale; and having submitted the issues in the petition for the Court's decision;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed That:

1. The mortgage executed on the 27th day of June, 1951, on the Oil Screw Sun King by respondents herein, as mortgagors, to the libelant herein, as mortgagee, as recited in the libel, for the security of a certain promissory note in the total amount of \$145,000.00, be and the same hereby is declared a valid lien on the Oil Screw Sun King,

her engines, etc., and on all property covered by said mortgage in the amount of \$57,723.89, together with interest at $4\frac{1}{2}\%$ per annum from June 27, 1955, to date, as well as such sums advanced by libelant to preserve and maintain the vessel and for insurance thereof, as hereinafter set forth, prior and senior to all other liens on said vessel. The foregoing [53] libelant and intervening libelants shall also have and recover their costs herein in their respective priorities as hereinafter set forth. Additionally, libelant shall have and recover the amount of \$3,500.00, in accordance with the provisions of the said promissory note herein, as and for the reasonable cost and value of libelant's attorneys' fees;

2. That the proceeds from the sale of said vessel be paid into the registry of the Clerk of this Court and that the following are the amounts due to libelant and intervenors with their respective priorities as follows:

(1) The Security-First National Bank of Los Angeles, libelant and mortgagee, has a valid and subsisting lien prior to all other liens, as follows:

(a) Balance due on the principal of the promissory note of June 27, 1951 \$57,723.89

(b) Interest on said balance due on said promissory note from June 27, 1955 to May 3, 1957, at $4\frac{1}{2}\%$ per annum \$ 5,470.25

(c) Costs of preservation and maintenance of vessel, including insurance, as follows:

(i) Premium on port risk insurance on Sun King from January 4, to May 3, 1957\$ 1,169.88

(ii) Protection and indemnity insurance on Sun King from January 4 to May 3, 1957\$ 561.48

(iii) San Diego Marine Construction Co.—repairs required to get insurance\$ 3,334.83

(iv) Arthur DeFever and James Potts—survey, inspection and appraisal for insurance\$ 190.00

(v) Wharfage charges\$ 184.00

(d) Allowance for attorneys' fees\$ 3,500.00

(e) Libelant's costs of suit\$1,690.96

(2) That subject to the above priority of the Security-First National Bank of Los Angeles, San Diego Marine Construction Co., a California corporation, intervening libelant, has a valid, prior and subsisting lien against the said vessel, as follows:

(a) Invoice of July 27, 1956; repairs ..\$6,254.74

(b) Supplemental repairs\$ 82.93

(c) Interest on above amount at 7% per annum from August 1, 1956, to May 3, 1957\$ 331.20

(d) Costs of suit\$ 30.50

(3) That subject to the above priorities of the Security-First National Bank of Los Angeles and San Diego Marine Construction Company, an intervening libelant, has a valid, prior and subsisting lien against said vessel, as follows:

(a) Agreed net amount for diesel engine furnished vessel\$5,500.00

(b) Costs of suit\$ 30.50

(4) That subject to the above priorities of Security-First National Bank of Los Angeles, San Diego Marine Construction Co., and J. T. Siler, Star-Kist Foods, Inc., a California corporation, has a valid, prior and subsisting lien against the vessel, as follows:

(a) Agreed balance due on open book account\$7,079.02

(b) Interest on above at 7% per annum from August 31, 1956, to May 3, 1957\$ 333.20

(c) Costs of suit\$ 30.50

3. That if the net proceeds of the sale of said Oil Screw Sun King, her engines, tackle, apparel and furniture, are insufficient to pay the amounts awarded to Security-First National Bank of Los Angeles, a national banking association, libelant, a decree in personam in favor of libelant for such deficiency, with interest, shall be entered against respondents Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Juan Seijo, Frank

P. Rodrigues, John Farinha, Francisco S. Jardim, Carmen Seijo, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis, jointly and severally; that if the net proceeds of the sale of said O. S. Sun King, her engines, etc., are insufficient to pay the amounts awarded intervening libelants herein, to wit: San Diego Marine Construction Co., J. T. Siler, and Star-Kist Foods, Inc., a decree in personam may be entered on behalf of said intervenors for such deficiency against respondents, the court reserving at this time its decision as to whether the same shall be [56] against respondents, insofar as the intervening libels only are concerned, jointly or jointly and severally.

4. That the title to the fathometer on said Oil Screw Sun King is reserved to Raytheon Manufacturing Company.

5. That libelant and intervenors are hereby given the right to purchase said vessel at the Marshal's sale heretofore ordered, and to apply amounts due libelant and intervenors upon the purchase price of the vessel.

6. That the petition of the County of San Diego be denied as claiming a non-maritime lien and one subsequent to the maritime liens adjudicated herein.

Dated: San Diego, California, this 3rd day of May, 1957.

/s/ JAMES M. CARTER,

United States District Judge.

Submitted by:

LILLICK, GEARY, McHOSE,
ROETHKE & MYERS,

WILLIAM A. C. ROETHKE,
LAWRENCE D. BRADLEY,

By /s/ WILLIAM A. C. ROETHKE,
Proctors for Libelant.

[Endorsed]: Filed May 3, 1957.

Docketed and entered May 7, 1957. [57]

[Title of District Court and Cause.]

OBJECTIONS TO ORDER CONFIRMING SALE

Come Now the individual respondents above named and object to the confirmation of the Marshal's Sale of the above-named vessel on the 3rd day of May, 1957, upon the grounds that the said sale was unfair and the bid price, to wit: the sum of \$26,500.00, was and is grossly inadequate.

Said objections are based upon the annexed Affidavit of John Gerald Driscoll, Jr., and the Memorandum of Authorities attached hereto.

Dated: May 10th, 1957.

/s/ JOHN GERALD DRISCOLL, JR.,
Proctor for Individual Re-
spondents. [58]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN GERALD
DRISCOLL, JR.

State of California,
County of San Diego—ss.

John Gerald Driscoll, Jr., being first duly sworn,
deposes and says:

That he is the Proctor for the individual respondents above named and makes this Affidavit on their behalf.

That on the 15th day of March, 1957, the Secretary of the Interior [62] of the United States, acting under the provisions of Section 4 of the Fish and Wildlife Act of 1956, authorized a loan to be secured by preferred mortgage upon the respondent vessel in the sum of \$126,837.00; that said loan was authorized after due investigation of the condition of said vessel and after an appraisal thereof by competent marine surveyors and appraisers.

That the true value of said vessel is well in excess of said sum of \$126,837.00; that affiant is informed and believes and alleges the fact to be that the appraised value of said vessel by the Fish and Wildlife Service of the Department of the Interior of the United States is \$225,000.00.

/s/ JOHN GERALD DRISCOLL, JR.

Subscribed and Sworn to before me this 10th day of May, 1957.

[Seal] /s/ HAZEL G. LAWDEY,
Notary Public in and for the
Said County and State.

My commission expires Nov. 6, 1960.

[Endorsed]: Filed May 10, 1957. [63]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CON-
CLUSIONS OF LAW AND FINAL DE-
CREE

The individual respondents above named object to the proposed Findings of Fact, Conclusions of Law and Final Decree presented by Libellant, a copy of which was served this day upon the undersigned, Proctor for Respondents, and move to amend the same as follows, to wit:

1. Strike paragraphs 7, 8, and 9 of the proposed Findings of Fact. [64]

2. Amend paragraphs 3, 4 and 5 of the Conclusions of Law by striking from each of said paragraphs the words "and against the respondents, jointly and severally."

3. Strike paragraphs 3, 4 and 5 of the Final Decree.

Dated this 24th day of May, 1957.

/s/ JOHN GERALD DRISCOLL, JR.,
Proctor for Individual
Respondents.

[Endorsed]: Filed May 24, 1957. [65]

In the United States District Court, Southern
District of California, Southern Division

In Admiralty No. 1976-SD-C

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES, a National Banking Association,

Libellant,

vs.

OIL SCREW SUN KING, Her Engines, Tackle,
Apparel and Furniture; DONALD L. HOBBS;
JOSEPH N. POMBO; JOSEPH MAR-
CHANT; GILBERT D. MARCHANT; MAN-
UEL G. MARCHANT; HARRY S. GARCIA;
JUAN SEIJO; FRANK P. RODRIGUES;
JOHN FARINHA; FRANCISCO S. JAR-
DIM; CARMEN SEIJO; MARIA TEIX-
EIRA; MANUEL JOSEPH FERNANDES;
MARGARET MADRUGA; MANUEL P.
AMARAL; AUGUST R. LUIS, JR.; and
MARINA F. LUIS,

Respondents.

J. T. SILER; STAR-KIST FOODS, INC.; SAN
DIEGO MARINE CONSTRUCTION COM-
PANY; and RAYTHEON MANUFACTUR-
ING COMPANY,

Intervenors.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND FINAL DECREE

The interlocutory decree, establishing validity,
priority and amounts of claims, foreclosing pre-

ferred ship's mortgage and [66] award of attorney's fees having been entered herein on May 7, 1957, and the United States Marshal, by virtue of a venditioni exponas, having sold at public auction on May 3, 1957, to Edward X. Madruga, the Oil Screw Sun King, her engines, tackle, apparel and furniture, for the sum of \$26,500.00, and the Court having made, on May 10, 1957, its order confirming the Marshal's sale and the United States Marshal having deducted his fees, commissions and expenses for the sale from the aforesaid sale price and having deposited the balance in the amount of \$26,150.88 with the Clerk of the Court, and the Clerk of the Court having, on May 17, 1957, taxed costs and the Order Confirming the Marshal's Sale having been entered on May 21, 1957, and the Court being fully advised in the premises, hereby makes its Findings of Fact, its Conclusions of Law and its Final Decree as follows:

Findings of Fact

1. The preferred ship's mortgage of libelant Security-First National Bank of Los Angeles, is a valid preferred ship's mortgage and is a valid and subsisting lien against the Oil Screw Sun King, her engines, tackle, apparel and furniture, prior and senior to all other liens on said vessel.

2. The respondents herein defaulted on the mortgage note dated June 27, 1951, payable to the order of libelant Security-First National Bank of Los Angeles.

3. The fathometer equipment on board the Oil

Screw Sun King is the property of intervening libelant Raytheon Manufacturing Company, a corporation, under a lease agreement with title reserved to Raytheon Manufacturing Company.

4. The intervening libelant San Diego Marine Construction Company has a valid and subsisting lien against the Oil Screw [67] Sun King subordinate only to the lien of libelant Security-First National Bank of Los Angeles.

5. The intervening libelant J. T. Siler, d.b.a. J. T. Siler Company, has a valid and subsisting lien against the Oil Screw Sun King subordinate only to the liens of the Security-First National Bank of Los Angeles and San Diego Marine Construction Company.

6. The intervening libelant Star-Kist Foods, Inc., has a valid and subsisting lien against the Oil Screw Sun King subordinate only to the liens of the Security-First National Bank of Los Angeles, San Diego Marine Construction Company and J. T. Siler, d.b.a. J. T. Siler Company.

7. The intervening libelant San Diego Marine Construction Company performed repairs on the Oil Screw Sun King at the request of respondents, the reasonable and agreed value of which is the sum of \$3,684.65.

8. The intervening libelant J. T. Siler, d.b.a. J. T. Siler Company, furnished a Diesel engine to the Oil Screw Sun King at the request of respondents,

the reasonable and agreed value of which is the sum of \$3,492.50.

9. The respondents are indebted to intervening libelant Star-Kist Foods, Inc., on an open book account in the agreed amount of \$4,093.50.

10. The petition of the County of San Diego claims a nonmaritime lien.

Conclusions of Law

1. The Court has jurisdiction of all named parties and the subject matter of the libel, the intervening libelants and petitioner. [68]

2. Libelant Security-First National Bank of Los Angeles, is entitled to a decree against the Oil Screw Sun King, her engines, tackle, apparel and furniture and against the respondents, jointly and severally, in the amount of \$73,825.29.

3. Intervening libelant San Diego Marine Construction Company is entitled to a decree against the Oil Screw Sun King, her engines, tackle, apparel and furniture and against the respondents, jointly and severally, in the amount of \$3,684.65.

4. Intervening libelant J. T. Siler, d.b.a. J. T. Siler Company, is entitled to a decree against the Oil Screw Sun King, her engines, tackle, apparel and furniture and against the respondents, jointly and severally, in the amount of \$3,492.50.

5. Intervening libelant Star-Kist Foods, Inc., is entitled to a decree against the Oil Screw Sun King,

her engines, tackle, apparel and furniture and against the respondents, jointly and severally, in the amount of \$4,093.50.

6. Intervening libelant Raytheon Manufacturing Company is the sole owner of the fathometer equipment on the Oil Screw Sun King and is entitled to remove said fathometer equipment.

7. The County of San Diego does not have a maritime lien against the Oil Screw Sun King and is not entitled to any decree against said vessel or the proceeds of the sale.

Final Decree

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1. That the balance of \$26,150.88 from the proceeds of the sale of the Oil Screw Sun King, her engines, tackle, apparel and furniture be paid forthwith by the Clerk of the Court to [69] libelant Security-First National Bank of Los Angeles.

2. That libelant Security-First National Bank of Los Angeles recover from respondents Donald L. Hobbs; Joseph N. Pombo; Joseph Marchant; Gilbert D. Marchant; Manuel G. Marchant; Harry S. Garcia; Juan Seijo; Frank P. Rodrigues; John Farinha; Francisco S. Jardim; Carmen Seijo; Maria Teixeira; Manuel Joseph Fernandes; Margaret Madruga; Manuel P. Amaral; August R. Luis, Jr., and Mariana F. Luis, jointly or severally, the

sum of \$47,674.41, with interest thereon from May 4, 1957, at the rate of seven per cent (7%) per annum until paid.

3. That intervening libelant San Diego Marine Construction Company recover from respondents Donald L. Hobbs; Joseph N. Pombo; Joseph Marchant; Gilbert D. Marchant; Manuel G. Marchant; Harry S. Garcia; Juan Seijo; Frank P. Rodrigues; John Farinha; Francisco S. Jardim; Carmen Seijo; Maria Texeira; Manuel Joseph Fernandes; Margaret Madruga; Manuel P. Amaral; August R. Luis, Jr., and Mariana F. Luis, jointly or severally, the sum of \$3,684.65.

4. That intervening libelant J. T. Siler, d.b.a. J. T. Siler Company, recover from respondents Donald L. Hobbs; Joseph N. Pombo; Joseph Marchant; Gilbert D. Marchant; Manuel G. Marchant; Harry S. Garcia; Juan Seijo; Frank P. Rodrigues; John Farinha; Francisco S. Jardim; Carmen Seijo; Maria Teixeira; Manuel Joseph Fernandes; Margaret Madruga; Manuel P. Amaral; August R. Luis, Jr.; and Mariana F. Luis, jointly or severally, the sum of \$3,492.50.

5. That intervening libelant Star-Kist Foods, Inc., recover from respondents Donald L. Hobbs; Joseph N. Pombo; Joseph Marchant; Gilbert D. Marchant; Manuel G. Marchant; Harry S. Garcia; Juan Seijo; Frank P. Rodrigues; John Farinha; Francisco S. Jardim; Carmen Seijo; Maria Teixeira; Manuel Joseph Fernandes; Margaret Madruga; Manuel P. Amaral; August R. Luis, Jr.;

and [70] Mariana F. Luis, jointly or severally, the sum of \$4,093.50.

6. That intervening libelant Raytheon Manufacturing Company is the sole owner of the fathometer equipment on the Oil Screw Sun King and is entitled to remove said fathometer equipment.

7. That petitioner County of San Diego take nothing herein.

Dated: San Diego, California, this 26th day of Sept., 1957.

/s/ JAMES M. CARTER,

United States District Judge.

Submitted by:

LILLICK, GEARY, McHOSE,
ROETHKE & MYERS,

WILLIAM A. C. ROETHKE,

LAWRENCE D. BRADLEY, JR.

By /s/ WILLIAM A. C. ROETHKE,

Proctors for Libelant.

Approved as to substance and form. Also, it is stipulated through the undersigned proctors in behalf of their respective clients that the final decree hereinabove set forth may be made and entered forthwith.

September 24th, 1957.

/s/ JOHN GERALD DRISCOLL, JR.,

Proctor for Respondent.

DONNELLY, MacNULTY AND
BUTLER,

By /s/ RICHARD MacNULTY,
Proctors for San Diego Marine Construction Co., a
Corporation, Intervenor.

REAL & REAL,

By /s/ M. REAL,
Proctors for Star-Kist Foods, Inc., a Corporation,
Intervenor. [71]

/s/ WILLIAM P. CRAWFORD,
Proctor for J. T. Siler, dba J. T. Siler Company,
Intervenor.

JAMES DON KELLER,

/s/ CARROLL H. SMITH,
Deputy D. A., Proctor for County of San Diego,
Petitioner.

LILLICK, GEARY, McHOSE,
ROETHKE & MYERS,

WILLIAM A. C. ROETHKE,

LAWRENCE D. BRADLEY, JR.

By /s/ WILLIAM A. C. ROETHKE,
Proctors for Libellant.

[Endorsed]: Filed September 26, 1957.

Entered September 27, 1957. [72]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUBSTITUTION
OF DEFENDANT AND AMENDMENT OF
JUDGMENT

To: Alva Hammel, assignee of Security First National Bank of Los Angeles, Libellant; Roger S. Woolley, assignee of J. T. Siler, Star-Kist Foods, Inc., and San Diego Marine Construction Company, Interveners; and Augustina Seijo, Executrix of the Estate of Juan Seijo, Deceased:

You, and Each of You, Will Please Take Notice, that [73] on Monday, the 14th day of July, 1958, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, in the courtroom of the above-entitled Court, in the Court House Building, 325 West F Street, San Diego, California, respondents Donald L. Hobbs, Joseph N. Pombo, Joseph Marchant, Gilbert D. Marchant, Manuel G. Marchant, Harry S. Garcia, Frank P. Rodrigues, John Farinha, Francisco S. Jardim, Carmen Seijo, Maria Teixeira, Manuel Joseph Fernandes, Margaret Madruga, Manuel P. Amaral, August R. Luis, Jr., and Mariana F. Luis will move the above-entitled Court for an order substituting Augustina Seijo, as Executrix of the Estate of Juan Seijo, Deceased, as a respondent in the above-entitled action, in the place and stead of Juan Seijo, and amending the judgment in the above-entitled action by substituting said Augustina Seijo, as Executrix of the Estate of Juan

Seijo, Deceased, in the place and stead of Juan Seijo. Said motion will be made upon this notice, the affidavit of John Gerald Driscoll, Jr., attached hereto, and the records and files of said Court.

Dated at San Diego, California, this 23rd day of June, 1958.

/s/ JOHN GERALD DRISCOLL, JR.,
Proctor for the Above-Named
Respondents. [74]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN GERALD
DRISCOLL, JR.

State of California,
County of San Diego—ss.

John Gerald Driscoll, Jr., being first duly sworn, upon oath deposes and says:

That he is the proctor for respondents in the above-entitled action; that he has been informed and believes, and therefore alleges the fact to be, that Juan Seijo, one of the respondents in this action, died on June 23, 1957, [75] and that thereafter, on or about the 15th day of July, 1957, Augustina Seijo was duly appointed Executrix of his estate by the Superior Court of the State of California, in and for the County of Santa Clara, in proceeding No. 47475 of the records and files of said Court, and that said Augustina Seijo duly qualified as such Execu-

trix and at all times since said date has been and now is the duly appointed Executrix of said estate.

/s/ JOHN GERALD DRISCOLL, JR.

Subscribed and sworn to before me this 23rd day of June, 1958.

[Seal] /s/ HAZEL G. LAWDEY,
Notary Public in and for Said
County and State.

My commission expires November 6, 1960.

[Endorsed]: Filed June 24, 1958. [76]

[Title of District Court and Cause.]

SPECIAL APPEARANCE IN OPPOSITION TO
NOTICE OF MOTION FOR SUBSTITU-
TION OF DEFENDANT AND AMEND-
MENT OF JUDGMENT

Now comes Augustina, Seijo, executrix of the last will of Juan Seijo, deceased, and makes this special appearance without submitting herself to the jurisdiction of the above-entitled court for the purpose of opposing notice of motion for substitution of defendant and amendment of judgment, and quashing the service of such notice upon the ground that this court has no jurisdiction to entertain such motion as the judgment in said cause has long since become final, and not subject to amendment [77] by adding

or bringing in a new party as a respondent subject to such judgment, and upon the ground that said judgment insofar as it purports to be a judgment against Juan Seijo is void and ineffectual for any purpose, and the Court is without jurisdiction to render or enter the same, and the service of the above-mentioned notice of motion for substitution of defendant and amendment of judgment is unauthorized and does not constitute process requiring said executrix to appear or become a party to said action.

This appearance and opposition will be made upon the grounds above mentioned and based upon the affidavit of Maurice J. Rankin filed herewith and the papers, records and files in said cause.

LUCE, FORWARD, KUNZEL
AND SCRIPPS, and

RANKIN, ONEAL,
LUCKHARDT AND CENTER,

By /s/ MAURICE J. RANKIN,
Attorneys for Augustina Seijo, Executrix of the
Last Will of Juan Seijo, Deceased.

Affidavit of service by mail attached.

[Endorsed]: Filed July 18, 1958. [78]

[Title of District Court and Cause.]

AFFIDAVIT OF MAURICE J. RANKIN

State of California,
County of Santa Clara—ss.

Maurice J. Rankin, being first duly sworn, on oath deposes and says:

That he is an attorney at law and a member of the law firm of Rankin, Oneal, Luckhardt and Center maintaining offices in the city of San Jose, County of Santa Clara, State of California;

That he is the attorney for Augustina Seijo, executrix of the last will of Juan Seijo, who died June 23, 1957, being [79] at the time of his death a resident of the County of Santa Clara, State of California;

That thereafter the will of said deceased was admitted to probate in the Superior Court of the State of California, in and for the County of Santa Clara, and on July 25, 1957, letters testamentary in the estate of said decedent were issued to Augustina Seijo and she ever since has been and now is the duly appointed and acting executrix in said estate;

That affiant as attorney for said executrix is familiar with all the facts pertaining to the administration of said estate and all the facts herein averred;

That the purported findings of fact and decree in the above-entitled cause were not made, signed or

entered until September 7, 1957, at which time said Juan Seijo was deceased, he having died June 23, 1957, as hereinabove stated;

That notice to creditors of said estate was published for the time required by law, the first publication being July 30, 1957, said notice requiring all persons having claims against the estate of said decedent to file them with the necessary vouchers in the office of the Clerk of the Superior Court of the State of California in and for the County of Santa Clara within six months after the first publication of said notice or within said period to present the same with the necessary vouchers to the said executrix at 315 First National Bank Building, San Jose, County of Santa Clara, State of California;

That none of the respondents in the above cause who are moving this court for an order substituting said executrix as respondent in said action and amending the judgment thereof by substituting her in place and stead of Juan Seijo, have ever presented or made any claim against the estate of said Juan Seijo by filing a claim for contribution by his estate for or respecting the judgment in the above cause or by presenting such claim [80] as they or any of them might have for contribution by said Juan Seijo or his estate, for any liability or obligation arising out of the joint venture, the subject matter of the above-entitled action, and on which the judgment therein is based, nor have respondents or any of them presented or filed against said estate any claim of any kind or character, and the time

for presentation of such or any claim against said estate has long since expired.

/s/ MAURICE J. RANKIN.

Subscribed and sworn to before me this 14th day of July, 1958.

[Seal] /s/ J. V. ENDERT,
Notary Public in and for the County of Santa Clara,
State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed July 18, 1958. [81]

[Title of District Court and Cause.]

CONSENT TO ORDER SUBSTITUTING
DEFENDANT AND AMENDING JUDGMENT

Alva Hammel, assignee of Security-First National Bank of Los Angeles, Libelant in the above-entitled action, hereby consents to the entry of an order of this Court substituting Augustina Seijo, as Executrix of the Estate of Juan Seijo, Deceased, as a respondent in the above-entitled action, and amending the judgment heretofore entered in said action by substituting said Augustina Seijo as Executrix of said [3] Estate as a judgment debtor in the place and stead of Juan Seijo, Deceased.

Dated this 1st day of July, 1958.

/s/ ALVA HAMMEL.

Duly verified.

[Endorsed]: Filed July 21, 1958. [4]

[Title of District Court and Cause.]

CONSENT TO ORDER SUBSTITUTING
DEFENDANT AND AMENDING JUDGMENT

Roger S. Woolley, assignee of J. T. Siler, Star-Kist Foods, Inc. and San Diego Marine Construction Company, Intervenor in the above-entitled action, hereby consents to the entry of an order of this Court substituting Augustina Seijo, Executrix of the Estate of Juan Seijo, Deceased, as a respondent in the above-entitled action, and amending the judgment heretofore entered in said action by substituting said Augustina [1] Seijo as Executrix of said estate as a judgment debtor in the place and stead of Juan Seijo, Deceased.

Dated this 16th day of July, 1958.

/s/ ROGER S. WOOLLEY.

[Endorsed]: Filed July 21, 1958. [2]

[Title of District Court and Cause.]

STIPULATION AS TO FACTS

It is hereby stipulated by and between counsel for the respondents above named, with the exception of Juan Seijo, Dec'd., and counsel for Augustina Seijo, Executrix of the Estate of Juan Seijo, that:

On October 16, 1957, Roger S. Woolley, assignee of the judgment in favor of the intervenors herein, filed a claim for the amount due and unpaid under

the judgment with the said estate. On [89] March 7, 1958, this claim was rejected and the said assignee was notified in writing as prescribed by law. Thereafter, and within the time allowed by law, the said assignee filed suit on the rejected claim in Santa Clara County, California.

On December 10, 1957, the libelant, Security-First National Bank of Los Angeles, filed a claim with the said estate for the amount of its judgment (\$47,-543.24). This claim was also rejected by the said estate on March 7 or March 17, 1958, by a notice in writing as prescribed by law. No suit or further action has been filed by the said bank to this date.

On, 1958, the Security-First National Bank of Los Angeles assigned its judgment to Alva Hammel. To this date, no claim has been filed by the said Alva Hammel against the said estate, nor has any suit or other action been filed by him against the estate.

Dated: Nov. 6, 1958. .

/s/ JOHN GERALD DRISCOLL, JR.,
Proctor for the Above-Named
Respondents.

RANKIN, ONEAL, LUCKHARDT
AND CENTER and

LUCE, FORWARD, KUNZEL &
SCRIPPS,

By /s/ ROBERT E. MCGINNIS,
Attorneys for Augustina Seijo, Executrix of the
Last Will of Juan Seijo, Deceased.

It Is So Ordered.

/s/ JAMES M. CARTER,

Judge of the District Court.

Nunc Pro Tunc November 6, 1958.

[Endorsed]: Filed November 12, 1958. [90]

[Title of District Court and Cause.]

ORDER FOR SUBSTITUTION OF DEFEND-
ANT AND AMENDMENT OF FINAL DE-
CREE

The motion of the individual respondents herein, other than Juan Seijo, for an order substituting Augustina Seijo as Executrix of the Estate of Juan Seijo, deceased, in the place and stead of Juan Seijo, and amending the final decree herein came on regularly for hearing on the 21st day of July, 1958, and on the 3rd day of November, 1958, said respondents appearing by their Proctor, John Gerald Driscoll, Jr., and Augustina Seijo, as such Executrix, appearing in opposition to said motion by her Proctors, Luce, Forward, Kunzel & Scripps and Rankin, Oneal, Luckhardt and Center, and it appearing to the Court that said motion was duly and regularly served upon said Executrix by the United [91] States Marshal in the manner required by law, and it further appearing that Juan Seijo died on the 23rd day of June, 1957, subsequent to the entry of

the interlocutory decree herein, and it further appearing that libelant assigned all of its rights under said final decree to Alva Hammel, and that said intervenors assigned all of their rights under said final decree to Roger S. Woolley, Trustee, and that both of said assignees have filed herein their written consent to the granting of said motion, and the Court having heard argument of counsel, together with stipulations of fact made in open court, and good cause appearing for the granting of said motion,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That said motion be, and the same is hereby, granted and Augustina Seijo as Executrix of the Estate of Juan Seijo, Deceased, is hereby substituted as a respondent in this action in the place and stead of Juan Seijo, effective from and after the death of said Juan Seijo on June 23, 1957;

2. That paragraphs 2, 3, 4 and 5 of the Final Decree entered herein on September 27, 1957, be, and the same are hereby, amended and corrected by substituting therein the words "Augustina Seijo, as Executrix of the Estate of Juan Seijo, Deceased" in lieu of the name "Juan Seijo" wherever said name appears in said paragraphs.

Dated this 6th day of November, 1958.

/s/ JAMES M. CARTER,

United States District Judge.

Approved as to Form:

LUCE, FORWARD, KUNZEL &
SCRIPPS and RANKIN,
ONEAL, LUCKHARDT AND
CENTER,

By /s/ ROBERT E. MCGINNIS,
Proctors for Said Executrix.

[Endorsed]: Filed November 6, 1958.

Entered November 12, 1958. [92]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Augustina Seijo, as Executrix of the Estate of Juan Seijo, deceased, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order for substitution of defendant and amendment of final decree entered in this action on the 12th day of November, 1958.

Dated: December 9, 1958.

LUCE, FORWARD, KUNZEL &
SCRIPPS,

By /s/ ROBERT E. MCGINNIS,
Proctors for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed December 11, 1958. [93]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant states that it intends to rely on the following points:

1. That the court erred in substituting the Appellant as a respondent in this action in the place and stead of Juan Seijo.

2. That the court erred in amending Paragraphs 2, 3, 4 and 5 of the Final Decree entered [98] herein by substituting therein the words "Augustina Seijo" as Executrix of the Estate of Juan Seijo, deceased, in lieu of the name "Juan Seijo" wherever the name appears.

Dated: Dec. 19, 1958.

RANKIN, ONEAL, LUCKHARDT
AND CENTER and

LUCE, FORWARD, KUNZEL &
SCRIPPS,

By /s/ ROBERT E. MCGINNIS.

[Endorsed]: Filed December 22, 1958. [99]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below con-

stitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 100, inclusive, containing the original:

Libel of Foreclosure of Preferred Ship Mortgage, etc., filed 1/4/57.

Libel in rem and personam in intervention of San Diego Marine Construction Co., filed 1/28/57.

Libel in rem and personam in intervention of J. T. Siler, filed 2/1/57.

Libel in rem and personam in intervention of Star-Kist Foods, Inc., filed 2/4/57.

Interlocutory Decree establishing validity, priority and amounts of claims, etc., entered 5/7/57.

Objections of Respondents to order confirming sale.

Objections of Respondents to Findings of Fact, Conclusions of Law and Final Decree.

Findings of Fact, Conclusions of Law and Final Decree, entered 9/27/57.

Notice of Motion for substitution of Defendant and Amendment of Judgment filed 6/24/58.

Special Appearance in opposition to notice of motion for substitution of defendant and amendment of judgment.

Affidavit of Maurice J. Rankin.

Assignment of Judgment by J. T. Siler.

Assignment of Judgment by San Diego Marine Construction Co.

Assignment of Judgment by Star-Kist Foods, Inc.

Stipulation as to Facts.

Order for substitution of Defendant and Amendment of Final Decree.

Notice of Appeal.

Appellant's Designation of Record on Appeal.

Statement of Points upon which Appellant intends to rely.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: January 9, 1959.

JOHN A. CHILDRESS,
Clerk;

[Seal] /s/ WM. A. WHITE,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Consent to Order substituting Defendant and Amending Judgment executed by Roger S. Woolley, 7/16/58.

Consent to Order substituting Defendant and Amending Judgment executed by Alva Hammel, 7/1/58.

(Copy) Stipulation as to Record on Appeal.

Dated: March 3, 1959.

JOHN A. CHILDRESS,
Clerk;

[Seal] /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16323. United States Court of Appeals for the Ninth Circuit. Augustina Seijo, as Executrix of the Estate of Juan Seijo, Deceased, Appellant, vs. Donald L. Hobbs, Et Al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed January 12, 1959.

Docketed: January 15, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of District Court and Cause.]

AN AGREED STATEMENT OF THE CASE IN
LIEU OF A PORTION OF THE RECORD

Pursuant to Rule 49 of the Rules of Practice in Admiralty and Maritime cases, the parties to this appeal, believing that the questions presented by the appeal herein can be determined by the Court of Appeals without an examination of all the pleadings, present this statement of the case in lieu of designating the entire record in the case. A stipulation as to the contents of the record on appeal will accompany this agreed statement.

1. The questions presented by this appeal and the points to be relied upon by the appellant are contained in the statement of points upon which appellant intends to rely, which is a part of the designated record in this case.

2. The facts essential to a decision to the questions presented by this appeal are as follows:

A Libel of Foreclosure of Preferred Ship Mortgage was filed on January 4, 1957. Thereafter a libel in rem and in personam in intervention was filed against the respondents in the case by the San Diego Marine Construction Company, praying that the vessel in question be condemned to pay the sum of \$6,298.82 and that the intervenor have judgment against the respondents in this amount. The sum was alleged to have been expended for material and labor in repairing the vessel.

Thereafter, a libel in rem and in personam in intervention was filed by J. T. Siler for the sum of \$6,297.52 and costs and attorney fees, and prayed that the vessel be condemned and sold to pay the said sum and that the intervenor have judgment against the vessel and the persons named as respondents.

Thereafter, a libel in rem and in personam in intervention was filed by Star-Kist Foods, Inc., for the approximate sum of \$7,079.02, and it was prayed that the vessel be condemned and sold to pay the sum and that the intervenor have judgment against the vessel and the persons named as respondents.

Appropriate answers were filed on behalf of the respondents, including Juan Seijo. Juan Seijo was represented by a proctor at all proceedings in the case prior to his death on June 23, 1957.

On May 23, 1957, proposed findings of fact and conclusions of law and final decree were lodged with the Clerk. On May 24, 1957, objections to proposed findings of fact, conclusions of law and final decree were filed on behalf of all respondents. On August 5, 1957, a hearing was held as to the objections to the findings of fact, conclusions of law and final decree. On September 27, 1957, the findings of fact, conclusions of law and final decree were entered.

On or about June 21, 1958, the respondents in the case, with the exception of Juan Seijo, filed a notice of motion for the substitution of Augustina Seijo, as Executrix of the Estate of Juan Seijo, in said action

in the place and stead of Juan Seijo and to amend the judgment previously entered (and included as a portion of the designated record) by substituting the said Augustina Seijo as Executrix of the Estate of Juan Seijo in the place and stead of Juan Seijo. This was thereafter served on Alva Hammel, assignee of the libelant in the action, Roger S. Woolley, assignee of the said intervenor, and the said Augustina Seijo.

Dated this 27th day of January, 1959.

/s/ JOHN GERALD DRISCOLL, JR.,
Proctor for the Above-Named
Respondents.

RANKIN, ONEAL, LUCKHARDT
AND CENTER and
LUCE, FORWARD, KUNZEL &
SCRIPPS,

By /s/ ROBERT E. MCGINNIS,
Proctors for Augustina Seijo, Executrix of the
Estate of Juan Seijo, Deceased.

[Endorsed]: Filed January 28, 1959, U. S. C. A.

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix of
the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS, et al.,

Appellees.

Appeal from the United States District Court for
the Southern District of California
Southern Division

APPELLANT'S OPENING BRIEF

RANKIN, ONEAL, LUCKHARDT
& CENTER,

First National Bank Building,
San Jose 13, California;

LUCE, FORWARD, KUNZEL &
SCRIPPS,

BY ROBERT E. MCGINNIS,

1220 San Diego Trust & Savings Building,
San Diego 1, California

Attorneys for Appellant Augustine
Seijo, Executrix of Last Will of
Juan Seijo, Deceased

FILE

MAY - 4 1959

PAUL P. O'BRIEN

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No. 16323

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix
of the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS; JOSEPH N.
POMBO; JOSEPH MARCHANT;
GILBERT D. MARCHANT; MANUEL
G. MARCHANT; HARRY S. GARCIA;
JUAN FARINHA; FRANCISCO S.
JARDIM; CARMEN SEIJO; MARIA
TEIXEIRA; MANUEL JOSEPH
FERNANDES; MARGARET MADRUGA;
MANUEL P. AMARAL; AUGUST R.
LUIS, JR. ; and MARINA F. LUIS,

Appellees.

APPELLANT'S OPENING BRIEF

I

BASIS OF JURISDICTION

The initial pleading in this case was a libel of foreclosure of a preferred ship mortgage and for monies due in admiralty under the Ship Mortgage Act of 1920. 46 U.S.C. §§ 911 et seq. The pleadings alleged that the ship was located within the Southern District of California. Jurisdiction, therefore, is vested in the United States District Court for the Southern District of California. 28 U.S.C. §§ 1331, 1333. Since this was a final decision disposing of the action and this is not a matter upon which a direct review may be had in the Supreme Court of the United States, this Court has jurisdiction to review said order on appeal. 28 U.S.C. 1291. The libel of foreclosure is set forth in the record from pages 3 through 13.

II

STATEMENT OF THE FACTS

On January 4, 1957, a libel for the foreclosure of a preferred ship mortgage and for monies due was filed by the Security-First National Bank of Los Angeles against the Oil Screw SUN KING and a number of individual respondents, including Juan Seiyo. (R. 3) Intervening libels were filed on behalf of J. T. Siler, Star-Kist Foods, Inc., San Diego Marine Construction Company and Raytheon Manufacturing Company. Answers to the libels were filed on behalf of the respondents, including Juan Seiyo, in February, 1957. On May

3, 1957 an Interlocutory Decree establishing the validity, priority and amounts of claims and foreclosing the mortgage was entered. (R. 14) Thereafter, proposed Findings of Fact and Conclusions of Law and Final Decree were submitted to the Court, and on May 24, 1957 Objections to the Proposed Findings were filed on behalf of all respondents, including Juan Seijo. (R. 26) The Objections proposed to strike out certain paragraphs and amend certain others.

On June 23, 1957 Juan Seijo died. Pursuant to a hearing held thereafter and on September 27, 1957, the Findings of Fact and Conclusions of Law and Final Decree were entered, all without the Estate of Juan Seijo being a party to the proceedings in any way. The decree provided for a deficiency judgment in favor of the libelant and intervenors in the sum of \$47,674.41, with interest at the rate of seven per cent (7%) per annum until paid, against all respondents and purportedly including Juan Seijo, as an individual.

Thereafter, the judgments were paid and an assignment from the libelant, Security-First National Bank of Los Angeles, was taken in the name of Alva Hammel, and from the intervenors in the name of Roger S. Woolley. Then, on June 25, 1958, over one year after the death of Juan Seijo, the respondents filed a Notice of Motion for the substitution of the Estate of Juan Seijo as a respondent in the place and stead of him as an individual, and to amend the judgment to make it effective against the Estate. (R. 35) On July 18, 1958, a Special Appearance in Opposition to the Notice of Motion was filed on behalf of the Estate.

Notice to Creditors of said Estate was published for the time required by law, the first publication being July 30, 1957, said Notice requiring all persons having claims against the Estate of said decedent to file them with the necessary vouchers in the office of the Clerk of the Superior Court for the County of Santa Clara within six months after the first publication, or within said period to present the same with the necessary vouchers to the Executrix at 315 First National Bank Building, San Jose, California.

None of the respondents in the above cause who moved the trial court for the order substituting said Estate as respondent in the action and amending the judgment have ever presented or made any claim against the Estate by filing a claim for contribution by the Estate for or respecting the judgment in the above cause, or by presenting such claim as they might have for contribution by the Estate for any liability or obligation arising out of the joint venture.

On October 16, 1957, Roger S. Woolley, assignee of the judgment in favor of the intervenors, filed a claim against the Estate. On March 7, 1958, this claim was rejected, and the said assignee was notified in writing as prescribed by law. Thereafter, the said assignee filed a suit on the rejected claim in Santa Clara County, California, which suit is now pending. On December 10, 1957, Security-First National Bank of Los Angeles filed a claim with the Estate in the amount of \$47,543.24, which claim was also rejected on March 7, 1958 in the manner prescribed by law. To this date no suit or further action has been filed by the said bank.

During 1958 the Security-First National Bank of Los Angeles assigned its judgment to Alva Hammel. To this date no claim has been filed by the said Alva Hammel against the said Estate, nor has any suit or other action been filed by him against the Estate.

On November 6, 1958, the United States District Court for the Southern District of California entered an Order substituting the Estate as a respondent in the case and amending the Final Decree to make the Estate a party to it. (R. 44)

III

SPECIFICATION OF ERRORS

The only error specified on this appeal is that the court erred in ordering the substitution of the Estate of Juan Seijo as a respondent in the place and stead of Juan Seijo as an individual and in amending the judgment to make it effective against the said Estate.

IV

ASSUMING THAT THE LEGAL PROCEEDINGS TO DATE HAD TAKEN PLACE IN STATE COURT, THE CALIFORNIA PROBATE CLAIM STATUTE WOULD BAR ENTRY OF A JUDGMENT AGAINST THE ESTATE.

As stated above, the respondents in this action are, by their motion seeking to establish the liability of the Estate of Juan Seijo for a portion of the deficiency judgment entered and to establish their right of contribution. Their motion goes beyond seeking mere substitution of a party in an action and asks, in addition, that the judgment be made fully effective against the Estate. A claim has been filed by Roger S. Woolley, assignee of the judgment in favor of the intervenors, and a California Superior Court action against the Estate is now pending.

However, no claim has been filed by Alva Hammel, assignee of the judgment in favor of the Security-First National Bank of Los Angeles, libelant, and no action has been filed on behalf of Alva Hammel or the said bank. At no time has a claim been filed on behalf of the moving parties in this case.

Where an action is pending against a decedent at the time of his death, a party seeking to hold his Estate liable for his obligation must file a creditor's claim in the usual manner:

"If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof is made of such filing or presentation." California Probate Code, § 709.

Probate Code § 732 provides that where a judgment for money was rendered against a decedent before his death, the judgment must be filed or presented in the same manner as other claims. Besides the prohibition against recovery stated in the above section, it is further provided in California Probate Code § 716 that:

"No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator . . . "

Therefore, the failure to file or present claims has barred the entry of a judgment against the Estate. The judgment as entered by the District Court purports to allow the individual respondents a right of contribution for portions of sums paid by them and would permit collection of a judgment in the name of Alva Hammel, who has not to this date filed a claim. Of course, the validity of the claim filed by the assignee, Roger S. Woolley, is being litigated in State Court.

The matter of whether this rule barring actions because of failure to present claims is altered because

the question in the case at bar is raised where a Federal Court is sitting in admiralty will be covered in the next part of this brief.

V

THE FACT THAT LEGAL PROCEEDINGS
TO DATE OCCURRED IN A FEDERAL
COURT SITTING IN ADMIRALTY DOES
NOT MAKE THE CALIFORNIA CLAIMS
STATUTE INAPPLICABLE

As there has been no federal legislative or judicial pronouncement on the application of probate claims statutes in admiralty, it is submitted that state law must control.

"The federal courts, as has been shown, have no jurisdiction, generally speaking, of the administration of estates of decedents, or over executors and administrators in the administration of their duties as such, such matters being in most respects solely for the appropriate courts of the states pursuant to the statutes thereof; and especially is it true that the mode or system provided by the particular state legislature for the presentation and allowance of claims against the estates of decedents . . ."

3 Bancroft, Probate Practice, 2d ed., 480-481 (1950).

Although in certain areas it has been necessary for Congress or the courts to promulgate a uniform general

rule to apply in admiralty, the attendant policies are not applicable in the situation at bar. In the instant case, the in rem phases of the litigation had been completed before the death of the decedent and the question remaining was solely one of the entry of an in personam judgment for the deficiency.

The United States Supreme Court clearly recognized the applicability of state law in admiralty in the case of Just vs. Chambers, 312 U.S. 383, 85 L. ed. 903, 61 Sup. Ct. 687 (1940). A petition was filed in admiralty to limit liability for the personal injuries which had occurred upon petitioner's yacht, in Florida territorial waters, due to petitioner's negligence. Subsequent to the filing, the petitioner died. The Supreme Court noted that a tort action did not survive the death of the tortfeasor under classical maritime law; it also noted that the action was properly in admiralty. Nevertheless, it permitted the claimant actions to proceed against the estate of the deceased petitioner, declaring that admiralty courts should adopt state law in such cases, where Congress has not acted. As Florida law provided for the survival of the action, the claimants prevailed. The court expressly said that this principle of following state law in admiralty cases is not limited to any particular situation such as wrongful death.

In 1955, the Supreme Court made it clear that where a Court was sitting in admiralty and no federal rule had been established to govern a particular situation the state law was to govern. In Wilburn Boat Company vs. Firemen's Fund Insurance Company, 348 U.S. 310, 99 L. ed. 337, 75 Sup. Ct. 368 (1955), an action was brought on a marine insurance contract.

The company defended upon the grounds that the insured had breached several provisions of the contract. Although the case was originally based upon diversity of citizenship, the Supreme Court treated the matter as being within federal jurisdiction.

"Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. *New England Mut. M. Ins. Co. v. Dunham* (US) 11 Wall 1, 20 L ed 90. But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule." (348 U.S. 313)

The Court stated that the questions in the case were these:

"Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established Federal admiralty rule governing these warranties? (2) If not, should we fashion one?" (348 U.S. 314.)

The court answered both of these questions in the negative, stating that insurance was a field where state regulation had prevailed during the entire history of our country and that Congress had not acted at all. It was concluded that the federal courts could only establish a body of regulations for marine insurance 'piecemeal, on a case by case basis. Such a creeping approach would result in leaving marine insurance largely unregulated for years to come."

The policy announced in the Wilburn Boat case supra is particularly applicable to the deficiency judgment situation in the case at bar. Classical maritime law did not afford a maritime lien for a ship mortgagee. Such protection is a recent statutory creation. See Bogart v. The John Jay, 58 U.S. 399, 15 L. ed. 95 (1854), holding that a ship mortgage was not even within the admiralty jurisdiction. Maritime law has taken cognizance of such mortgages only since the Ship Mortgage Act of 1920 (46 U.S.C. 911-984). Nothing is said therein concerning the time within which a mortgagee's claim might be asserted against the estate of a deceased mortgagor. Section 954 of the Act, which specifically covers suits in personam upon failure of the in rem action to satisfy the mortgage claim, is silent about such rights. On the other hand, the law of California, and of the several states in general, has developed a body of statutory and case law to handle such matters. Absent any evidence of congressional intention to impose upon the survivors of deceased mortgagors obligations which had not previously existed either in admiralty or at common law, that these rules of state practice should here prevail.

A. State Law Has Governed Substitutions of Estates for Parties Deceased in Pending Suits in Admiralty.

In another situation quite similar to that in the present case, federal courts have ruled that although a substitution was authorized by federal law the propriety of doing this depended upon the validity of the cause under state law. Where a party to a personal injury action dies during the pendency of the suit, federal law authorizes the substitution of the personal representative.

The courts have refused to do this unless the cause of action otherwise remained valid under state law.

In The Miramar (In re Statler) 31 F. 2d 767 (S. D. N. Y. 1929), aff'd 36 F. 2d 1021 (2nd Cir., 1930), cert. denied, 281 U.S. 752, 74 L. ed. 1163, 50 Sup. Ct. 355 (1930), the owner of a sunken vessel brought a limitation proceeding in admiralty to stay various actions brought in state and federal courts by representatives of officers and men whose lives had been lost. After hearing, but before final decision, the petitioner died. Claimants moved for an order directing that his estate be substituted in his stead. Note, that because the ship had been lost, there was no res, and the liability of the petitioner in the limitation proceeding would have been in personam only, and is thus similar to the case at bar.

"When the deceased petitioner elected to resort to a proceeding for the limitation of his liability, if any, the result of such action was to bring the claims that were asserted against him within the application of the law that is here administered . . . a part of such law is to be found in Section 955 of the Revised Statutes (28 U.S.C.A. 2d 778) which provides that: 'when either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the action survives by law prosecute or defend any suit to final judgment'. " (31 F 2d, 767, 769.) (Emphasis supplied.)

As the statute conferring the right of action did not specifically indicate whether estates could be substituted, or whether the cause of action survived, the court looked to the common law. Citing New York cases the court held the action to have abated upon the death of the petitioner.

Insofar as its construction of the Jones Act was concerned, The Miramar was overruled in Nordquist v. United States Trust Company of New York, 188 Fed. 2d 776 (2nd Cir., 1951). Its general treatment of federal and state law, and their inter-relationship, was left untouched, however.

A similar result was reached in Amoth v. United States, 3 Fed. 2d 848 (D. C. Oregon, 1925), a libel in personam for personal injury, in which the libelant died during pendency of the action, and the respondent moved to abate; the motion was granted.

"The rule seems to be that the cause, where the libel is in personam, abates by the death of the libelant before judgment or decree, unless it is interdicted by a survival statute of the state . . ." (3 Fed. 2d 848.)

The court looked only to Oregon statutes to determine whether it should grant the motion.

These authorities dictate that a federal court should follow a state statute barring an action against an estate. A federal statute or court rule providing for the substitution of the estate in a proceeding does not breathe life into an otherwise barred cause of

action. It is merely a rule of procedure. This is particularly true of Rule 24 (a) as the Act creating the federal rules specifically provides that they shall not abridge or modify the substantive rights of any litigant. 28 U.S.C. Sec. 723, et seq.; 4 Moore, Federal Procedure, 2d ed., 522-523.

B. The "Savings to Suitors" Clause Provides for the Application of State Law in Admiralty.

The applicability of the probate claims statute in admiralty cases is further provided for by the "saving to suitors" clause. 28 U.S.C. Sec. 1333. The Judiciary Act of 1789, while bestowing exclusive admiralty jurisdiction on the federal courts, saved "to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." The language, in the Judiciary Code of 1948, now reads:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors any and all cases all other remedies to which they are otherwise entitled." 28 U.S.C. Sec. 1333.

That the 1940 Act did not change the application of state law in admiralty appears from Madruga v. Superior Court, 346 U.S. 556, 98 L. ed. 290, 74 Sup. Ct. 298 (1954). The Supreme Court writing of Section 1333 said: "We take it that this change in no way narrowed the jurisdiction of the state courts under the original 1789 Act."

There has been a great deal of litigation concerning the content of the "saving to suitors" clause. The applicability of this clause is shown by Meade v. Luksefjell, 148 F. Supp. 708 (SD N. Y. 1957), which involved a libel for personal injury in which libelant died after the action was commenced. The court noted the well known rule that maritime law did not permit such actions to survive death. It proceeded to apply the New York survival statute, saying that as Congress had not acted in the field of abatement and revival of maritime torts, New York law was to control. The court grounded its decision specifically upon the "saving to suitors" clause. The remedy to which petitioner was "otherwise entitled" was to have his cause of action survive his death.

The Meade case supra is authority for the proposition that since Congress has not acted to provide rules of non-claim against decedents' estates in maritime situations, and as the states have well defined non-claim statutes, such state statutes should constitute remedies saved to suitors in admiralty.

C. State Probate Claims Statutes Have Been Applied in Cases Where Federal Law Was Generally Controlling.

Further, it must be noted that state probate claims statutes have frequently been dispositive of cases in which federal law was generally controlling. In Mann v. Kleisdorff, 16 F. 2d 997 (5th Cir., 1927), suit was brought to recover from a stockholder in a failed national bank, pursuant to federal statutory law. The suit was not brought against the estate of the deceased

shareholder within the period provided by the Mississippi claims statute.

"On this writ of error plaintiff contends, first, that the non-claim statute of Mississippi is inapplicable; and secondly, that it is in conflict with the federal statute, R. S. §5152, which provides that the estates and funds in the hands of executors or administrators 'shall be liable in like manner and to the same extent' as the testator or intestate would be if living." (16 Fed. 2d 992).

"To the end that estates may be promptly settled, it is the common, if not the universal, policy of the several states to bar by legislation claims against the estates of the dead within a less period of time than is required for the assertion of claims against persons who are living. The provision in R.S. §5152, does not have the effect of depriving a state of the power to make a difference in the time within which claims will be barred if not presented, on the one hand, to an executor, or, on the other, to the person interested if he be living. This section has no reference to the time of presentation of a claim, but only makes the funds in the hands of the legal representative as fully liable as the deceased would be if living." (16 Fed. 2d 997-998.)

The state non-claim statute was thus held to bar an action based upon federal legislation, even though, as here, there was specific provision for the substitution

of decedent's estate as a defendant.

This Court of Appeals has rendered similar decisions in similar cases on at least three occasions. In Certain-Teed Products Corporation v. Luke, 74 Fed. 2d 384 (9th Cir., 1934), an action was brought by a corporation against the administrator of a deceased debtor. The Arizona non-claim statute required that actions against administrators be brought within three (3) months after rejection of a claim. Plaintiff contended that a federal court of equity had power to grant relief from the strict application of such statute.

"A federal court of equity cannot relieve a claimant from the consequences of his failure to comply with the non-claim statutes of the state of the domicile of the decedent unless there is also a statute of that state permitting an action against the personal representative, notwithstanding the statutory limitation, in case justice and equity require it. This rule was stated by the Supreme Court in Security Trust Company v. Black River National Bank, 187 U.S. 211, 227 . . . as follows:

" 'Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the state of the domicile, and are bound by the same rules that govern the local tribunal.' "

A similar result was reached in Tobin v. Hymers, 99 Fed. 2d 740 (9th Cir., 1938), wherein it was held

that state law governed the aspect of the case relating to claims of the estate of a decedent. See also Suffel v. Bosworth, 95 Fed. 2d 494 (9th Cir., 1938), in which a receiver in bankruptcy filed a claim against a shareholder in a national bank. Upon the shareholder's death, the claim was filed against her estate. Judgment was against the estate. The administrator appealed, contending that compliance had not been made with the California non-claim statute. On appeal the decision was affirmed, the court considering only California statutes and California cases.

There have been a number of cases where jurisdiction was based upon diversity of citizenship decided prior to 1938 where federal courts have held that probate claims statutes barred the action. Orth v. Mehlhouse, 36 Fed. 2d 367 (D. C. Minn., 1929); Goodno v. Hotchkiss, 237 Fed. 686 (D. C. Conn., 1916); Schurmeier v. Connecticut Mutual Life Insurance Company, 124 Fed. 865 (8th Cir., 1903); Newberry v. Wilkinson, 190 Fed. 62 (1911).

D. The Policy Reserving Jurisdiction to Local Courts in Admiralty Matters Supports the Application of the Probate Claims Statute

The legislative power of the federal government over maritime law has been deemed to stem from the grant of judicial power appearing in Article III, Section 2, of the Constitution. See Gilmore and Black, The Law of Admiralty 40-42. As a corollary of this proposition, it has been held that states were not competent to legislate concerning matters in admiralty which were within the exclusive jurisdiction of the

federal courts. See The Moses Taylor, 71 U.S. 411, 18 L. ed. 397 (1867); The Hine v. Trevor, 71 U.S. 555, 18 L. ed. 451 (1867); Gilmore and Black, supra, page 33-36.

Conversely, it may be said that where a state court may assume jurisdiction to act, the substantive law of the state is also competent to effect the rights of the parties. This is the thrust of Madruza v. Superior Court, 346 U.S. 556, 98 L. ed. 290, 74 Sup. Ct. 298 (1954). On certiorari to the California Supreme Court to review a denial there of a writ of prohibition to restrain the Superior Court of San Diego County from proceeding to partition a vessel, the Supreme Court affirmed. The court declared that there was a sharp distinction between a proceeding which was essentially in personam, such as a partition suit, and one in rem. Where the action was in personam, the state court could act in a case where federal law had not preempted the field; in such an area jurisdiction is concurrent. The court indicated that such an in personam action was within the "saving to suitors" clause of Section 1333.

As the instant proceeding has become one in personam against the vessel mortgagors, the in rem proceeding against the SUN KING having been completed, the Madruza holding, and the language of the Supreme Court, are important in the decision of the case at bar. The court declared that there is no national admiralty rule concerning the partition of vessels. The following language could well have been written about admiralty cases involving probate claim statutes and the substitution of estates for deceased parties.

"The scarcity of reported cases involving such partition since the Constitution was adopted indicates that establishment of a national partition rule is not of major importance to the shipping world. We can foresee at this time no possible injury to commerce or navigation if states continue to be free to follow their own customary partition procedures. Easily accessible courts are well equipped to handle these essentially local disputes. Ordering the sale of property for partition is part of their everyday work. Long experience has enabled states to develop simple legislative and judicial partition procedures with which local judges and counsel are familiar. Federal courts have rarely been called upon to try such disputes and have established no settled rules for partition." (346 U.S. 556, 563).

Writing of Madruga v. Superior Court, it was said:

"The intent of the Supreme Court appears to have been to classify partition as a 'maritime but local action.' In 'maritime but local actions' in which there is no need for uniformity, admiralty courts as well as state courts apply state law. Consequently, until Congress or the Supreme Court establishes a maritime partition law admiralty courts can properly apply state partition law." Note, 42 Cal. Law Rev. 331, 336 (1954), citing Benedict On Admiralty, 6th ed., §35.

E. State Wrongful Death Statutes Have Been Applied in Maritime Cases.

A great number of admiralty cases which involve the application of state law are those treating wrongful death situations. The holdings are analogous and the language appearing in the opinions is extremely persuasive.

The Harrisburg, 119 U.S. 199, 30 L. ed 358 (1886) is the leading case holding that, in the absence of federal legislation, where a wrongful death action is brought in admiralty under a statute of a state, it must meet all of the requirements of that statute. Thus, because the state statute of limitations was not complied with, the action failed.

In Old Dominion Steamship Company v. Gilmore, 207 U.S. 398, 52 L. ed. 264 (1907), the question was whether the Delaware Wrongful Death Act could apply to give a right arising out of a wholly maritime tort. The court, speaking through Mr. Justice Holmes, said:

"The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction.' Art. 3, Sec. 2 . . . The doubt in this case arises as to the power of the states where Congress has remained silent.

"That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and

construed by the judiciary act of 1789 (1 Stat. at L. 77, Chap. 20, 39), 'saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it' (Rev. Stat. Sec. 563, cl. 8, . . .) leaves open the common law jurisdiction of the state courts over torts committed at sea . . . and as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouth-piece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts, tends to establish the legislative power of the state where Congress has not acted." (p. 404.)

Writing of Puleo v. H. E. Moss, 159 Fed. 2d 842 (2nd Cir., 1949), an admiralty case wherein the New York Wrongful Death Act was applied, it was said:

"As the state statutes---adopted by admiralty---created the rights of the parties the state law should be referred to in order to determine the validity of the claim, even though these rights are derived from death resulting from a maritime tort. A contrary result would enable the admiralty courts to apply maritime rules to the state . . . created . . . As a result, parties asserting rights under the statute arising from a tort would get preferential treatment as compared to parties claiming rights under the same statute because of a terrene tort." Stevens, Erie R.R. v. Tompkins and the

Uniform General Maritime Law, 64 Harv. L. Rev. 246, 266-267 (1950).

The same might well be said of a case wherein a decedent had mortgaged a ship and also nonmaritime chattels. In the administration of his estate, there would seem to be no reason for the maritime mortgagees to receive preferential treatment to the terrene mortgagees, in their claims for deficiency judgments. Yet, such would be the result, if the judgment of the district court is affirmed.

VI

A JUDGMENT ENTERED AGAINST A PERSON DECEASED IS ERRONEOUS AND VOID.

The foregoing proposition is well established by the authorities. Estate of Cazaurang, 35 Cal. App. 2d 556, 558 (1939) ("A court is without jurisdiction to proceed when one of the parties before it has died and there has been no substitution of any representative of the deceased."); Boyd v. Lancaster, 32 Cal. App. 2d 574, 578 (1939); Maxon v. Avery, 32 Cal. App. 2d 300, 302 (1939).

It must be emphasized that by the order which is the subject of this appeal the District Court has not only substituted the estate as a party but has gone further and purportedly amended the judgment to make it effective against the estate. As has been pointed out, a hearing on the merits was held after the death of

Juan Seijo, which resulted in the amounts of the claims being reduced. The decedent's representative was entitled to be present at that hearing and allowed to advance any defense or objection deemed appropriate as to the amount of the judgment or its share of liability. The entry of the decree itself was of course a determination on the merits of the case. Accordingly it is submitted that the judgment entered is void.

VII

THE TIME WITHIN WHICH THE JUDGMENT IN THE CASE AT BAR MAY BE AMENDED HAS EXPIRED.

The provision for altering or amending a judgment appears in Rule 59(e) of the Federal Rules and provides that the motion shall be served not later than ten days after entry of judgment. Rule 6(b) relating to extensions of time has expressly excepted Rule 59(e) from its scope. Therefore, the time may not be extended.

Authorities cited to the Court previously show that the judgment entered against a dead person is void. But even conceding for the sake of argument that the judgment is not void but merely erroneous, a judicial error has been committed and therefore one of substance and not merely ministerial. The case of Hogan v. Superior Court, 74 Cal. App. 704, 710-711 (1924) took the position that such a judgment was not void but was merely voidable. The court there stated that the error must be corrected on appeal if it shows of record and by a writ of coram nobis if it does not.

"And in *Phelan v Tyler*, supra (64 Cal 80) in giving the reason for the rule the court says: 'There is nothing in the Code which would justify the inference that the death of a party pending an appeal ousts the jurisdiction of the Supreme Court and renders its judgment void unless before the rendition thereof a representative of said deceased party be substituted in his stead. The reason why, 'in such cases, the judgment is simply erroneous, but not void. is because the court having obtained jurisdiction over the party in his lifetime, is thereby empowered to proceed with the action to final judgment; and while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error coram novis if the fact must be shown aliunde.' (Freeman on Judgments, 153.)' "

"A reasonable time for relief from an error of law by the court should not exceed the time allowed for an appeal." 7 Moore, Federal Procedure, 2d ed. 236-239.

Since the time for appeal has long since expired, the relief sought by the motion in the lower court was barred.

The motion is also barred for the additional reason that it has not been made "within a reasonable time" as required by Rule 60(b). The moving parties are co-defendants and all of them, including the decedent, were

represented by one counsel. Obviously these parties had knowledge of the death of Juan Seijo even before the final judgment was entered. Nothing in the record indicates that the parties did not have this knowledge.

Having this knowledge the parties must, therefore, be held to have intended that the judgment be entered as it was and that no mistake, inadvertence, etc. is present. This is supported by the fact that these parties were represented at a hearing long after the death of Juan Seijo, where they were permitted to enter objections to the Findings of Fact and Conclusions of Law.

VIII

THE JUDGMENT IS VOID AS THE
AUTHORITY OF COUNSEL TO REP-
RESENT JUAN SEIJO AT THE HEARING
HELD AFTER HIS DEATH HAD
TERMINATED.

As stated before, Juan Seijo died on June 23, 1957. Thereafter a hearing was held to determine whether the liability against the respondents should be joint or joint and several. At that time the court also considered objections to the Findings of Fact and Conclusions of Law previously submitted. No authority need be cited for the proposition that the authority of an agent or attorney expires at death. Since the estate had not been made a party to the proceeding the interest of Juan Seijo could not be and was not represented at that hearing.

Accordingly, the judgment is void as to the decedent or his estate insofar as it is based upon the hearing held after his death and without his representation.

IX

THE COURT HAVING LOST JURISDICTION OVER THE PROCEEDINGS, NO IN PERSONAM JURISDICTION MAY BE ACQUIRED OVER THE ESTATE OF JUAN SEIJO.

As urged previously, the judgment entered in September, 1957 was void and this is supported by the cited points and authorities. The time to correct any judicial error has now expired. Therefore, the Court has lost jurisdiction including the jurisdiction it had over Juan Seijo prior to his death. With the expiration of this jurisdiction, the case at bar is comparable to the situation where the Court had never acquired in personam jurisdiction over the decedent.

CONCLUSION

It was urged by the appellee to the courts below that the contention of the estate in this case was based upon the "sheerest technicality." Every case in which limitation periods are involved is in a sense "technical"; the statutes here applicable have their firmest basis in the policy of the law. Probate claim statutes are universal. In many states the claim period is less than

six months. Time periods relating to the modification of judgment are regarded to be of such importance that it is often expressly provided that the time within which the motions are to be made cannot be extended. Rule 6(b), Federal Rules of Civil Procedure. The motion in this case was made over one year after the death of Juan Seiyo and nine months after the judgment was entered.

Therefore it is concluded:

1. The judgment may not be made effective as to the estate since the time for filing claims has expired as set out above.
2. The Claim Statute is applicable where a Federal Court is sitting in Admiralty.
3. Failure to make the original judgment effective as to the estate is a judicial error which the court has lost the power to correct as the ten day period provided in Rule 59 and the time for filing appeals under the interpretation of Rule 60 have expired.
4. The judgment is void as the determination on the merits was made after the decedent's death without he or his estate being represented.
5. The judgment being void the court has lost jurisdiction of any proceedings relating to the interest of Juan Seiyo and therefore cannot acquire in personam jurisdiction over the estate.

Accordingly, it is submitted that the decision of the District Court must be reversed.

Respectfully submitted,

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Last Will of Juan Seijo, Deceased

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix of
the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS, et al.,

Appellees

Appeal From the United States District Court for
the Southern District of California
Southern Division

BRIEF OF APPELLEES

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No. 16323

IN THE

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vs.

DONALD L. HOBBS; JOSEPH N.
POMBO; JOSEPH MARCHANT;
GILBERT D. MARCHANT; MANUEL
G. MARCHANT; HARRY S. GARCIA;
JUAN FARINHA; FRANCISCO S.
JARDIM; CARMEN SEIJO; MARIA
TEIXEIRA; MANUEL JOSEPH
FERNANDES; MARGARET MADRUGA;
MANUEL P. AMARAL; AUGUST R.
LUIS, JR.; and MARIANA F. LUIS,

Appellees.

BRIEF OF APPELLEES

I

STATEMENT OF THE FACTS

Appellant's statement of the facts is incomplete and requires amplification. It might be inferred therefrom that Juan Seijo died before any determination of the merits of this case. This is not so. The fact of the matter is that prior to the death of Juan Seijo substantially all of the issues had been determined and the Trial Court had already made and entered its Interlocutory Decree Establishing Validity, Priority and Amounts of Claims, Foreclosing Preferred Ship's Mortgage and Award of Attorney's Fees. The significance of this decree will be referred to later in this brief.

It may assist this Court in its determination of this appeal if a brief review of the proceedings is here set out.

The action was instituted by Security-First National Bank of Los Angeles by a libel against the Oil Screw SUN KING and against seventeen individual respondents, one of whom was Juan Seijo, and all of whom were co-owners of the vessel. The libel sought to foreclose a preferred mortgage on the vessel, securing a promissory note which the vessel owners either executed or agreed to pay (Trans. pp. 3 to 15).

Three intervening libels to enforce maritime liens against said vessel, and for judgment against its owners, were filed by J. T. Siler, Star-Kist Foods, Inc. and San Diego Marine Construction Company. Raytheon Manufacturing Company also filed an intervening libel to establish its title to a fathometer which

been installed on said vessel.

Hearings were had on February 25, 1957 and on April 22, 1957. At these hearings all parties appeared by counsel. As a result thereof, on May 3, 1957, the Trial Court entered its interlocutory decree, which is set out in full at pages 14 to 23 of the record. An inspection of this decree will demonstrate that all of the issues before the Court (with one exception, hereinafter noted) were finally disposed of. The exact amount due from respondents to libelant and each of the three intervenors was fixed, together with the amount due by way of interest and court costs. The amount of the attorneys' fees due under the terms of said promissory note was fixed and awarded. Title to the fathometer was reserved to Raytheon Manufacturing Company. It was provided that if the net proceeds of the sale of the vessel was insufficient to satisfy the amount awarded to libelant on account of principal, interest and attorneys' fees, that a joint and several judgment for the deficiency should be entered against all of the individual respondents. Only one question was left open for further determination. That was the question of whether the deficiency decree in favor of the three intervenors and against the individual respondents should be joint or joint and several. This portion of the decree is set out in the transcript at page 23 and reads as follows:

" * * that if the net proceeds of the sale of said O. S. Sun King, her engines, etc., are insufficient to pay the amounts awarded intervening libelants herein, to wit: San Diego Marine Construction Co., J. T. Siler, and Star-Kist Foods,

Inc., a decree in personam may be entered on behalf of said intervenors for such deficiency against respondents, the court reserving at this time its decision as to whether the same shall be against respondents, insofar as the intervening libels only are concerned, jointly or jointly and severally." (Emphasis added)

The vessel was sold at marshal's sale on the afternoon of May 3, 1957, for \$26,500.00. Objections to an order confirming sale were filed by the individual respondents on May 10, 1957 (Trans. p. 24) and thereafter overruled on May 17, 1957. Proposed Findings of Fact, Conclusions of Law and Final Decree were prepared by proctors for libelant and lodged with the Clerk on May 23, 1957, and on the following day objections thereto were filed by the individual respondents. The objections appear in the transcript at page 26 and were entirely directed to the portions of the proposed findings and decree, which purported to establish the liability of the respondents to the three intervenors as joint and several rather than joint.

On the same day the Trial Judge entered a Minute Order, reading as follows:

"IT IS ORDERED that money deposited in Registry of Court be paid by the Clerk to the Libelant, Security First National Bank.

"IT IS FURTHER ORDERED that cause is set for hearing for settling of findings, etc. for Aug. 5, 1957, at 10 a.m.

"IT IS FURTHER ORDERED that Attorney Driscoll try to secure stipulation as to factual liabilities as to each intervening libelant as to who incurred debt and what capacity, and if that done said Stipulation be on file by August 5, 1957.

"IT IS FURTHER ORDERED briefs may be filed particularly by Attorney Driscoll and intervening libelants on question of Joint and Several liability."

On June 23, 1957, Juan Seijo died, and on July 25, 1957, Augustina Seijo was appointed executrix of his estate and Letters Testamentary issued by the Superior Court of Santa Clara County.

On August 5, 1957, a hearing was had on the respondents' objections to the Findings of Fact, Conclusions of Law and Final Decree and the matter continued to September 16, 1957.

It will be remembered in this connection that the Interlocutory Decree fixed the liability of respondents to the three intervenors as follows:

To San Diego Marine Construction Company.....	\$6,699.37
To J. T. Siler	5,530.50
To Star-Kist Foods, Inc.....	7,442.72

Negotiations between proctors for respondents and the three intervenors then resulted in a compromise wherein and whereby the amounts due the three

intervenors were reduced as follows:

To San Diego Marine Construction Company	\$3,684.65
To J. T. Siler	3,492.50
To Star-Kist Foods, Inc.	4,093.50

Thereafter, on September 26, 1957, the Final Decree was entered (Tr. p. 31).

It will be noted that insofar as the libelant Security-First National Bank of Los Angeles was concerned, the Final Decree added nothing to what had theretofore been established and adjudged by the Interlocutory Decree. It will also be noted that, insofar as the three intervenors were concerned, the Final Decree reduced the liability of the respondents from a total of \$19,672.59 to a total of \$11,270.65, but established that liability to be joint and several.

In the month of September, 1957, each of the three intervenors executed written assignments of their judgment claims to Roger S. Woolley. In October, 1957, Roger S. Woolley duly presented his Creditor's Claim, based on said judgment, to appellant as Executrix of the Estate of Juan Seijo, deceased.

In December, 1957, libelant, Security-First National Bank of Los Angeles, duly presented its claim for the amount due under the decree to appellant, as Executrix of the Estate of Juan Seijo, deceased.

In March, 1958, appellant, by notice in writing, rejected the Creditors' Claims of both Roger S. Woolley and libelant.

In June, 1958, libelant assigned its claims under said decree to Alva Hammel.

In June, 1958, respondents, other than Juan Seijo, filed their notice of motion for substitution of defendant and amendment of judgment, which was served upon appellant. Consents to the granting of said motion by Roger S. Woolley and Alva Hammel were duly filed. At the time set for hearing of said motion, counsel were directed to file briefs, which were thereafter filed. On November 6, 1958, the order appealed from was duly entered by Judge Carter.

II

THE POWER OF A TRIAL COURT TO SUBSTITUTE PARTIES AND AMEND DECREES IS NOT OPEN TO QUESTION

Rule 104 of the Admiralty Rules of the United States District Court, Southern District of California, provides, in part, as follows:

"Whenever, from the death of any of the parties, or changes of interest in the suit, or defect in the pleadings or proceedings, or otherwise, new parties to the suit are necessary the persons required to be made parties may be made such either by a petition on their part or by the adverse parties. "

The right of the Trial Court to adopt the foregoing rule is expressly conferred by Rule 44 of the Rules of Practice in Admiralty and Maritime Cases promulgated by the Supreme Court. Said Rule is found in Title 28, U.S.C. 109, and reads as follows:

"In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with the rules. "

In 2 Benedict on Admiralty (6th Edition) at page 563, it is said:

"When either party dies before final decree, the executor or administrator of such deceased party, in case the cause of action survives by law, may prosecute or defend the suit to final decree. The claimant or respondent is required to answer accordingly and the court hears and determines the cause and renders its decree for or against the executor or administrator, as the case may require. If the executor or administrator neglect or refuse to appear and make himself a party, the court may issue process requiring him to show cause why the action should not proceed, and if he fail to appear within twenty days after service of such process, the court may render its decree against the estate of the deceased party in the same manner as if the executor or administrator had voluntarily made himself a party. "

At page 564, it is said:

"In case one of several libelants or respondents dies before final decree, if the cause of action survives to or against the co-libelants or co-respondents, the suit does not abate by such death but a suggestion of the death is made on the record and the suit may proceed in the name of the survivors."

The power of a trial court to order substitution of parties is, of course, not confined to Admiralty cases. Rule 25(a)(1) of the Rules of Civil Procedure (Title 28, U. S. C. 265) provides as follows:

"If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

The power to order a substitution of parties is not limited to the Federal Courts, but is expressly conferred by statute in California. Section 385 of the Code of Civil Procedure of this state provides, in part, as follows:

"An action or proceeding does not abate by the

death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. "

Section 669 of the California Code of Civil Procedure provides as follows:

"If a party die before a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate. "

The general rule respecting the power of an Admiralty Court to amend its decrees is stated in 3 Benedict on Admiralty (6th Edition), page 193, as follows:

"After the decree is entered, it sometimes appears that by accident, oversight, mistake or misapprehension, the decree is erroneous. In such cases, the court of admiralty possesses the power of correcting or varying the decree, summarily, during the same term, and by proceedings under a libel of review, if the term has gone by. Such a variation, however, should be confined to the correction of an error arising from fraud of the prevailing party or from clerical inadvertence or from the defect of knowledge or information upon a particular point in the case, and the error must be brought to the attention of the court with

the utmost possible diligence. "

Although the power to correct a judgment formerly was limited to the term of court in which the judgment was rendered, that limitation no longer exists by virtue of the 1948 amendment to Section 452 of Title 28, U.S. Code, which now provides as follows:

"The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding. "

III

THE TRIAL COURT'S DISCRETION WAS CORRECTLY EXERCISED

In the recent case of Feener Business Schools Speedwriting Publishing Co. (1st Circuit - 1957), 249 Fed. 2d 609, a subsidiary corporation brought suit in the year 1952 to enjoin the use of a trade mark. Thereafter, the corporation was merged with and absorbed by a parent corporation. This fact was not then known to plaintiff's attorneys. A decree was entered in the name of the subsidiary corporation in July 1954. In 1955 this decree was affirmed by the Circuit Court of Appeals. Contempt proceedings were thereafter taken against defendants and affirmed on appeal in 1956. Thereafter the Supreme Court denied a petition for certiorari. After the filing of the remittitur a motion to substitute the parent corporation as a party plaintiff in lieu of the subsidiary corporation was filed and granted by the trial court in the month of April 1957. The trial court

by its order made the substitution effective nunc pro tunc "as of May 23, 1955, without prejudice to the proceedings heretofore had herein". On appeal from this order the Circuit Court of Appeals said, at page 612:

"But upon the merits we perceive nothing the matter with the said order. Only the sheerest technicality was involved in the order of substitution, whereby the parent corporation, having absorbed its wholly-owned subsidiary by merger was allowed to be substituted nunc pro tunc for the original nominal plaintiff in this case." (Emphasis added.)

Accordingly, the order was affirmed

It will be noted that in the above case the order of substitution was made three years after the entry of the final decree. There is no difference in substance or principle between the case cited and the case at bar. The substitution of a successor corporation for a defunct subsidiary corporation presents no different problem than the substitution of an executrix for a deceased party.

In the case of Irving Trust Company v. American Silk Mills, Inc., 72 Fed. 2d 288, the Circuit Court of Appeals of the Second Circuit was presented with a case where an action had been instituted by receivers of a corporation in their individual names as such receivers. A judgment in favor of plaintiffs was obtained in the trial court. After the entry of judgment, a motion was made to substitute the corporation as a party plaintiff in lieu of the individual receivers. On appeal

from this order the court held, at page 290:

"The corporation may be substituted as plaintiff throughout the action, and the judgment, if otherwise valid, may be amended nunc pro tunc so as to stand in the name of Garment Center Capitol, Inc. "

This court had occasion to consider the propriety of a comparable order in the case of Barnett v. United States, 82 Fed. 2d 765 (certiorari denied, 57 S. Ct. 9, 299 U.S. 546, 81 L. Ed. 402). In that case Judge Wilbur, speaking for the Court, says, at page 770:

"Here it may be appropriately added that, before the final decree was filed, Jackson Barnett died, and the Court entered a nunc pro tunc decree as of the date of the announcement of the decision which was in writing and signed by the judge. This was proper." (citing cases)

The learned Trial Judge had occasion to consider the question of substitution of parties in a prior civil suit. See Bertsch v. Canterbury, 18 F.R.D. 23. In that case in personam jurisdiction had not been acquired prior to defendant's death. Here, of course, in personam jurisdiction over Juan Seijo had been acquired prior to his death. The decision of Judge Carter in the case at bar is, therefore, entirely consistent with his ruling in the Bertsch case.

In the case of Milich v. Schlesinger, 156 F. Supp. 658, the Court says, at page 659:

"Defendant's contention that plaintiff would also be barred in this action by reason of Sec. 7-801(c), Burns' Ind. Stat. (1953) Replacement), because no claim was filed with defendant's estate within the six month period provided for by that section, is without merit. The court, in the case of the death of a party pendente lite, retains jurisdiction as if the decedent were still living, and has jurisdiction over proper amendments made after the death and substitution of parties. Clodfelter v. Hulett, 1884, 92 Ind. 426; Lawson v. Newcomb, 1859, 12 Ind. 439. If the decedent dies during the action, the action merely continues against his representative. Sec. 2-403, Burns' Ind. Stat.; Clodfelter v. Hulett, supra; Holland v. Holland, supra; I. L. E. Abatement Sec. 22. "

The Indiana statute involved in the above case is comparable to Section 385 of the Code of Civil Procedure. The California cases applying C.C.P. Section 385 and C.C.P. Section 669 reach a similar result.

See: Fox & Hale v. Norcross, 108 Cal. 478,
41 Pac. 328;
Leavitt v. Gibson, 3 Cal. 2d 90,
43 P. 2d 1091;
Norton v. City of Pomona, 5 Cal. 2d 54,
53 P. 2d 952;
Copp v. Rives, 62 C. A. 776, 217 Pac. 813.

In the case at bar the interlocutory decree resolved all issues of fact. That decree was an appealable order (see 28 U.S.C., Sec. 1292(c) and 4 Benedict on Admiralty, 6th Ed. 19). The time for an appeal from

such an order is fifteen days. (See Eggers v. Southern Steamship Co. (C. C. A. 5th), 112 Fed. 2d 347 (certiorari denied) 311 U.S. 680, 85 L. Ed. 438, 61 S. Ct. 49.) Since the order was entered on May 3, 1957, the time for appeal expired before Juan Seijo's death on June 23, 1957. The only question left open, therefore, at Juan Seijo's death was a question of law, namely, whether the liability of the individual respondents to the three intervenors was joint or joint and several. The interest of Juan Seijo in the determination of that question was identical with the interests of the other sixteen individual respondents who were represented by counsel. The determination of that question by compromise embodied in the final decree reducing the potential liability of all respondents from \$19,672.59 to \$11,270.65 was just as advantageous to Juan Seijo's estate as it was to the other sixteen respondents.

IV

REGARDING THE CALIFORNIA PROBATE CLAIMS STATUTES

Appellant contends that the Probate Claims Statutes of the State of California precluded the Trial Judge from making the order appealed from. Appellant's argument in this connection is set forth in subdivisions IV and V of her brief and covers pages 6 to 23.

Underlying appellant's argument in this connection is, we believe, a basic misconception by appellant of the order appealed from.

At page 6 of her brief, at the inception of her argument in this connection, we find the following statement:

"As stated above the respondents in this action are, by their motion seeking to establish the liability of the Estate of Juan Seijo for a portion of the deficiency judgment entered and to establish their right of contribution. "

This statement simply is not so. The order appealed from speaks for itself and is a complete refutation of this assertion. There is no mention therein of "a portion of the deficiency judgment" or of any "right of contribution". The further assertion that respondents' motion "goes beyond seeking mere substitution of a party in an action and asks, in addition, that the judgment be made fully effective against the Estate" is likewise not so. The motion of respondents, which is set out in the record, speaks for itself and refutes this assertion. All that is asked for in the motion is "an order substituting Augustina Seijo, as Executrix of the Estate of Juan Seijo, deceased, as a respondent * * * and amending the judgment * * * by substituting said Augustina Seijo, as Executrix of the Estate of Juan Seijo, deceased, in the place and stead of Juan Seijo. "

The assertion is made by appellant, at page 7 of her brief, that "The judgment as entered by the District Court purports to allow the individual respondents a right of contribution for portions of sums paid by them and would permit collection of a judgment in the name of Alva Hammel, who has not to this date filed a claim". This assertion is unfounded. The judgment does not

"purport to allow the individual respondents any right of contribution. No mention whatever is made therein of any right of contribution by the individual respondents. All that is determined by the judgment as amended is the liability of the respondents, including the Executrix of the Seijo Estate, to the libelant and the three intervenors. It is obviously incorrect to assert that the amended judgment "would permit collection of a judgment in the name of Alva Hammel, who has not to this date filed a claim". The amended judgment is, of course, silent as to Alva Hammel's right of collection. Alva Hammel is not mentioned in the judgment and his rights to collect the same are obviously solely the concern of the Probate Court of the County of Santa Clara, State of California and not the District Court of the United States. In this connection, we direct the Court's attention to Peoples Home Savings Bank vs. Saddler, 1 C. A. 189; 81 Pac. 1029. That case involved a death during an appeal. The court says, at page 194:

"Upon the death of the defendant the power of that (the Superior) Court to enforce its judgment by execution terminated, and the respondent was remitted for its collection to the probate jurisdiction of the court having charge of the administration of his estate, and to that court the appellant must present any defense there may be to its payment out of the assets of that estate."

The above language is pertinent here. At the time the order appealed from was entered the Trial Judge was concerned solely with the question of whether the Executrix should be substituted as a respondent in the place and stead of the decedent and the judgment therefore entered amended to reflect such substitution.

He was not concerned with any problems involved in the collection of the amended decree. Should any question thereafter arise respecting the collectability of the judgment, that question would of necessity be resolved by the Probate Court of Santa Clara County.

The further assertion of appellant at page 7 of her brief, that "the failure to file or present claims has barred the entry of a judgment against the Estate * * *" is incomprehensible in the light of the fact that it appears from the Stipulation as to Facts, appearing in the record at pages 42 and 43, that both Roger S. Woolley, as assignee of the judgments in favor of the three intervenors, and the libelant, Security-First National Bank of Los Angeles, did file claims against the Seijo Estate. It further appears from the affidavit of one of the attorneys for appellant (Tr. p. 40) that Notice to Creditors was first published on July 30, 1957, requiring the filing of claims against said estate within six months of that date. The claim of Roger S. Woolley was filed on October 16, 1957, and the claim of libelant was filed on December 10, 1957. Both claims, therefore, were filed within the time prescribed by law.

We are at a complete loss to understand how the appellant can seriously advance the argument that the California Probate Claims Statutes barred the Trial Judge from making the order appealed from when the record on its face shows that the claims statutes were fully complied with.

The cases cited by appellant in this subdivision of her brief are not in point here; however, we shall allude to them briefly. Just v. Chambers, 312 U.S. 383,

85 L. Ed. 903, 61 S. Ct. 687 (1940), did not involve the question of substitution of parties, as incorrectly stated by appellant. The petition for limitation of liability was filed in the first instance by the executor of the estate of the yacht owner, who died five days after the accident. See 113 Fed. 2d 105, at 107.

Wilburn Boat Company v. Firemen's Fund Insurance Company, 348 U.S. 310, 99 L. Ed. 337, 75 S. Ct. 368 (1955), is not in point. That case was concerned with warranties in a policy of marine insurance. The power of an Admiralty Court to order substitution of parties and correct a decree was not even mentioned.

The Miramar (In re Statler), 31 Fed. 2d 767 (S. D. N. Y. 1929), aff'd 36 Fed. 2d 1021 (2d Cir., 1930), certiorari denied, 281 U.S. 752, 74 L. Ed. 1163, 50 S. Ct. 355 (1930), did involve a question of substitution of parties. That case was decided under Section 955 of the Revised Statutes (Title 28 U.S.C.A. 2d 788). That section, of course, was the forerunner of Rule 25(a) of the Federal Rules of Civil Procedure. The sole question presented to the court was whether or not the action survived and the Court held it did not as it was based on tort. In the case at bar, the cause of action is not based on tort but is based upon contract and, under elementary rules survives the death of a party and is not extinguished thereby.

Amoth v. United States, 3 Fed. 2d 848, cited at page 13 of appellant's brief, and Meade v. Luksefjell, 148 F. Supp. 708, cited at page 15, involved tort actions and are, likewise, not in point.

Mann v. Kleisdorff, 16 Fed. 2d 997 (5th Cir. 1927), cited by appellant at page 15 of her brief, involved no question of substitution. The suit in the first instance was brought against the executrix.

The decision of this Court in the case of Certain-Teed Products Corporation vs. Luke, 74 Fed. 2d 384 (9th Cir. 1934), referred to by appellant at page 17, did not touch upon the problem involved in the case at bar. In that case a creditor sued the administrator of the debtor's estate upon a claim. The action was not instituted within the 3-month period prescribed by Arizona law. This Court held that a Federal Court of Equity was without power to relieve a claimant from his failure to comply with the statutory limitation.

The case of Tobin v. Hymers, 99 Fed. 2d 740 (9th Cir. 1938), cited by appellant at page 17 of her brief, likewise involves no question of substitution of parties. In that case a receiver of a National Bank sought to enforce the liability of a deceased stockholder against the sole devisee of his estate. This Court properly held that the Nevada law requiring the presentation of claims within three months after publication of Notice to Creditors precluded recovery.

Suffel v. Bosworth, 95 Fed. 2d 494 (9th Cir. 1938), cited by appellant at page 18 of her brief, involved a situation where, again, the suit was initially brought against a personal representative and affords appellant no solace.

Madrugá v. Superior Court, 346 U.S. 556, 98 L. Ed. 290, 74 S. Ct. 298 (1954), cited at page 14 of

appellant's brief, is far afield from the case at bar. That case was concerned with the jurisdiction of a state court to decree partition of a vessel as between co-owners.

The cases involving wrongful death statutes, cited at pages 21 and 22 of appellant's brief, are neither "analogous" or "persuasive", as appellant suggests. On the contrary, they are utterly foreign to the questions here presented and can afford no assistance to this Court in its consideration thereof.

V

THE DECREE WAS NOT VOID

Commencing at page 23 of her brief, appellant advances the argument that the final decree, signed by Judge Carter on September 26, 1957, was void by reason of the prior death of Juan Seijo. The only case cited in support of this argument is Estate of Cazaurang, 35 Cal. App. 2d 556, 558 (1939). Although the Court in that case did state that a court was without jurisdiction to proceed where one of the parties died, it will be noted that that case involved a Writ of Prohibition to restrain the Court from proceeding with a will contest until such time as a personal representative was substituted for the deceased party.

The Cazaurang case did not hold that a judgment obtained after the death of a party was void, and this is not the law of California.

In the case of Machado v. Flores, 75 C. A. 2d 759 (171 P. 2d 440), it is squarely held that a judgment rendered after the death of a party is not void. In that case the Court, after considering the earlier California cases in point, says, at page 762:

"* * * the California courts are not committed to the position advanced by appellants that the death of a party, ipso facto, renders absolutely void a judgment for or against such party. Such a judgment is, at most, a mere irregularity. "

VI

THE ORDER APPEALED FROM WAS NOT BARRED BY LAPSE OF TIME

In subdivision VII of her brief, appellant advances the contention that the motion of appellees was not filed in time. It is first urged that the ten-day limit prescribed by Rule 59(e) of the Federal Rules of Civil Procedure is applicable. It is also contended that Rule 60(b) applies. The answer to this contention is found in the fact that the enabling rule under which the Court acted in this case was Rule 104 of the local rules of the District Court. That rule contains no time limitation.

Rule 25(a) of the Rules of Civil Procedure permits the filing of a motion for substitution of parties "within two years after death".

Rule 59(e) was enacted to cover the special situation in the case of Boaz v. Mutual Life Insurance Co. ,

146 Fed. 2d 321, as appears from the notes of the Advisory Committee. That rule does not apply here.

In the case at bar, amendment of the judgment was a necessary corollary of the order substituting the executrix for the decedent as a respondent in this case. In the Feener Business Schools case (supra) the order of substitution was made three years after the entry of the decree. In Southern California Telephone Company v. Damenstein, 81 C. A. 2d 216, an order for substitution was granted thirteen years after the entry of the judgment.

If the Rules of Civil Procedure are applicable to this case, as appellant contends, her argument as to the timeliness of the motion is refuted by the rules themselves as the motion here was filed not only within the two-year period prescribed by Rule 25, but, also, within the one-year period prescribed by Rule 60.

VII

CONCLUSION

In the concluding portion of her brief, appellant alludes to our argument in the Court below wherein we characterized her objections to the order appealed from as involving the "sheerest technicality". We make no apology for this language for it was lifted verbatim from the decision of the Circuit Court of Appeals for the First Circuit in the Feener Business Schools case (supra). Indeed, we venture the suggestion that upon a review of this record this Court also will 'perceive

nothing the matter with the said order" and will conclude that on the merits it should be affirmed.

Respectfully submitted,

JOHN GERALD DRISCOLL, JR.
Proctor for Appellees

16323

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUGUSTINA SEIJO, as Executrix of
the Estate of Juan Seijo, Deceased,

Appellant,

vs.

DONALD L. HOBBS, et al.,

Appellees.

Appeal from the United States District Court for
the Southern District of California
Southern Division

APPELLANT'S REPLY BRIEF

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FILE

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PAUL P. O'BRIEN, C.

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DONALD L. HOBBS; JOSEPH N.
POMBO; JOSEPH MARCHANT;
GILBERT D. MARCHANT; MANUEL
G. MARCHANT; HARRY S. GARCIA;
JUAN FARINHA; FRANCISCO S.
JARDIM; CARMEN SEIJO; MARIA
TEIXEIRA; MANUEL JOSEPH
FERNANDES; MARGARET MADRUGA;
MANUEL P. AMARAL; AUGUST R.
LUIS, JR. ; and MARIANA F. LUIS,

Appellees.

APPELLANT'S REPLY BRIEF

I

STATEMENT OF THE FACTS

In subdivision VIII of our opening brief we state: "The judgment is void as the authority of counsel to represent Juan Seiyo at the hearing held after his death had terminated." Apparently the only answer made to this contention is contained in the Appellees' Statement of Facts. They have placed much emphasis upon the fact that a number of issues were determined by the interlocutory decree. However, counsel concedes that at least one issue remained and actually was determined after the death of Juan Seiyo. At least one other issue remained before the final decree could be entered and is overlooked by counsel. This involves the determination of amount of the deficiency judgment as appears from the interlocutory decree itself. The estate of the deceased had a right to be represented in these matters which occurred after death. If they had been, perhaps the amount of the final decree would have been reduced even further. The fact that in counsel's opinion such representation would have made little difference in the outcome of the case is no justification for the denial of such rights.

It is noted that appellees have referred to a Minute Order on pages 4 and 5 of their brief, which is not found in the transcript of the record.

II

THE TRIAL COURT DOES NOT DERIVE
"POWER" TO SUBSTITUTE PARTIES
AND AMEND DECREES FROM THE
RULES CITED.

The appellees have cited several admiralty rules of procedure for the proposition that the trial court is thereby empowered to act as it did in this case. This is incorrect as the rules are merely procedural tools for the court to carry out actions otherwise authorized by the law. This appears from the Supreme Court Admiralty Rules themselves wherein the District Courts are permitted to "regulate their practice". In speaking of court rules the United States Supreme Court has said:

"But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, or equity, or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of the rules which lower courts make for their own guidance under authority conferred. "

Washington-Southern Navigation Company vs.
Philadelphia Steamboard Company, 263 U. S. 629,
635-636 (1924).

This problem is discussed in Moore's work on Federal Procedure wherein it is recognized that a statute of limitations takes precedence over rules of

procedure: 'A statute of limitations involves substantive right. 'Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant.' " (28 U.S.C. Sec. 723 et seq.)⁴ Moore, Federal Procedure, 2d Ed., 522-523.

In view of the above, the trial court was not excused from considering the California claims statute because of the existence of the foregoing rules, nor may the latter be considered as overriding statutes of limitation or other provisions of law.

The reference to 3 Benedict on Admiralty (6th Ed), p. 193 made by appellees in subdivision II states with regard to the amendment of judgments: "...and the error must be brought to the attention of the Court with the utmost possible diligence." No showing has been made in this case as to why the motion to substitute parties was delayed until over one year after the death of Juan Seijo and nine months after the entry of the decree.

III

THE TRIAL COURT'S DISCRETION NOT CORRECTLY EXERCISED.

In subdivision III of the brief the appellees cite cases which are clearly distinguishable from the case at bar and are not at all authority in support of the trial court's action in this case. Feener Business Schools Speedwriting Publishing Co., 249 Fed. 2d 609, (1st Cir., 1957) cited at page 11 of appellees' brief,

involved the substitution of a successor corporation as a party three years after judgment. This case, of course, did not involve the probate claims statute; furthermore, even appellees will concede that the motion in this case would have to have been made within two years under Rule 25(a). Neither is Irving Trust Company v. American Silk Mills, Inc., 72 Fed. 2d 288 (2nd Cir., 1934) cited at page 12 of appellees' brief in point here.

In Barnett v. United States, 82 Fed. 2d 765 (9th Cir., 1936) cert. denied, 57 S. Ct. 9, 299 U.S. 546, 81 L. Ed. 402 (1936) cited at page 13, the final decision of the court was announced prior to death whereas the judgment was entered after death. (The opinion makes no mention of the entry of the judgment in the name of the estate). That situation would be covered by Probate Code Section 731 and the nunc protunc entry was, of course, proper:

"A judgment against a person who dies between the rendering of a verdict or decision and the entering of judgment thereon is not a lien on the real property of the decedent, but is payable in due course of administration."

It is noted parenthetically that appellees have quoted on page 10 of their brief the California Code of Civil Procedure Section 669 as reading: "If a party die before a verdict or decision . . ." where it actually reads: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party,

but is payable in the course of administration of his estate. "

It is only where an action is pending at death that filing the probate claim is a condition precedent to the entry of judgment against the estate. California Probate Code Section 709.

In the case of Milich v. Schlesinger, 156 F. Supp. 658 (1957) cited at page 13 of the appellees' brief, the Indiana statutes in question did not require that a claim be filed even in state court where an action was pending at the time of death. Instead, the statutes merely provided that the estate be made a party. This case was originally cited by the appellant in the court below to point out that very fact.

IV

THE PROBATE CLAIMS STATUTE IS APPLICABLE TO THE CASE AT BAR

In subdivision IV the appellees make much of the fact that the order appealed from does not specifically mention that the estate is being made liable for a portion of the judgment or that the other respondents are obtaining a right of contribution or a right to compel the estate to share responsibility for their liability under the judgment. What else can be the effect of making an estate a party to a judgment other than to impose liability under its terms? Why have the respondents (not the libellants or their assignees) vigorously advanced this motion and defended this appeal if it were

not to obtain a substantial advantage over the estate? The fact that the order merely states that the judgment is "amended" to add its name and delete that of the deceased does not mean that it is not fully effective against the estate.

Appellees insist that the enforcement of the judgment against the estate is solely the concern of the Probate Court in Santa Clara County inferring thereby that a claim would have to be presented at that time. It is appellants' impression that where an action is pending at death as here, claim presentation pursuant to Probate Code Section 709 is required and that a judgment entered thereafter is enforceable against the estate without filing a further claim. The case of Peoples Home Savings Bank v. Saddler, 1 Cal. App. 189, 81 Pac. 1029 (1905), cited at page 17 of appellees' brief is not in point as the judgment was entered before death. In that case the claim would have to be filed on the judgment pursuant to California Probate Code Section 732. The court refused to consider events occurring after judgment was entered, stating that the appeal spoke as of that earlier moment:

"The function of an appellate court is to review the action of the inferior court in rendering the judgment or making the order from which the appeal is taken...If the judgment is affirmed such affirmance is as of the date at which it was rendered." (1 Cal. App. 193)

Appellees have commented upon cases cited in subdivision V of our opening brief. These cases were, of course, not cited as being directly in point but instead

in support of principles which indicated that probate claims statutes are applicable in admiralty. Appellees have, in effect, answered none of the contentions which we have advanced in that portion of our brief.

V

AUTHORITIES CITED BY APPELLEES
ON THE QUESTION OF LENGTH OF
TIME ARE NOT PERSUASIVE.

Appellees have stated that Rule 59(e) is not applicable as the trial court "acted" under Rule 104 of its local rules. Rule 104 and Rule 25(a) both relate solely to substitution of parties and therefore obviously do not conflict with Rules 59 and 60 which pertain to the amendment of judgments. The rules cited by appellees have no bearing at all on the latter question. The amendment of the judgment was not at all a corollary of the order of substitution of the executrix for the defendant. It is one thing to make an estate a party to a suit and another thing to make it a party to a judgment without its being represented at hearings on the merits and without compliance with the condition precedent of claim presentation. This distinction goes to the very heart of the question in this case.

VI

CONCLUSION

A review of the authorities cited by the appellees reveals that they really do little to answer the contentions set forth in our answering brief. In many instances applicable principles are not even discussed. In view of the above and for the reasons advanced in this reply, it is submitted that the decision of the lower court must be reversed.

Respectfully submitted,

RANKIN, ONEAL,
LUCKHARDT & CENTER,
and
LUCE, FORWARD,
KUNZEL & SCRIPPS
By ROBERT E. McGINNIS

Attorneys for Appellant
Augustina Seijo, Executrix
of Last Will of Juan Seijo,
Deceased.

No. 16324 ✓

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN FREDERICK SILBAUGH,

Appellant,

vs.

P. G. SMITH,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant U. S. Attorney,
Chief, Criminal Division,

GEORGE W. KELL,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

MAR 18 1959

PAUL P. O'BRIEN, CLERK

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No. 16324
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN FREDERICK SILBAUGH,

Appellant,

vs.

P. G. SMITH,

Appellee.

BRIEF OF APPELLEE.

A.

Statement of Jurisdiction.

This appeal arises from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty under two counts of a seven-count indictment upon his plea of guilty. The indictment charged violations of Title 18, United States Code, Section 2312, transportation of stolen motor vehicles in foreign commerce. The violations occurred in San Diego County, California, within the Southern Division of the Southern District of California.

The jurisdiction of the District Court was based upon Title 18, United States Code, Section 3231. This court has jurisdiction to entertain this appeal and to review the questions raised herein under the provisions of Title 28, United States Code, Sections 1291 and 1294.

B.

Statement of the Case.

Upon his plea of guilty, appellant was convicted of offenses under Title 18, United States Code, Section 2312, as charged in counts one and four of the indictment [R. 20]. Appellant was thereupon ordered committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years on each of counts one and four, to run concurrently. The judgment is dated November 1, 1955 [R. 21].

Appellant had been brought into Federal Court under a writ of habeas corpus *ad prosequendum* dated September 21, 1955 [T. 10-11, Nov. 17. 1958]. The writ, itself, is not before this court, but there was never any dispute about the fact that appellant was in the County Jail at the time the Federal authorities required his presence [T. 8, Nov. 17, 1959; R. 6; Appellant's Op. Br. pp. 21, 27]. Following his appearance in Federal Court for judgment and sentence, appellant was returned to the California State Authorities and subsequently pleaded guilty to two counts of grand theft. He was committed by the California Authorities for service of his sentence, as may be gathered from R. 18 and 19. He was released by the Department of Correction, State of California, "subject to hold" [R. 23] and was thereupon taken into custody by the United States Marshal on December 16, 1957, and delivered to the Federal Correctional Institution at Terminal Island, California, for service of his Federal sentence [R. 22].

Appellant was released from Terminal Island on February 18, 1959, but is still on parole.

While in custody at Terminal Island in service of his Federal sentence, appellant filed a motion under Title 28,

United States Code, Sentence 2255, entitled "Motion to Enforce Original Judgment, Sentence, and Commitment." That motion was denied on October 24, 1958.

Appellant subsequently filed the petition for writ of habeas corpus [R. 2] which forms the basis for the present appeal. Although appellant attempts to distinguish between the original motion under Title 28, United States Code, Section 2255, and the petition for writ of habeas corpus (p. 2 of the motion for consolidation of appeals attached to Appellant's Op. Br.) the identical contentions were expressed in the petition for the writ of habeas corpus as had already been passed upon in the earlier motion.

Although there was apparently good grounds for dismissal of the petition for writ of habeas corpus, the District Court considering the matter permitted appellant to appear and argue his contention. The petition for writ of habeas corpus was denied on November 20, 1958 [R. 50].

C.

Statutes Involved.

Section 2255 of Title 28, United States Code, provides in pertinent part as follows:

"A prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence . . . was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

“An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.”

Section 2243, Title 28, United States Code, pertaining to hearings on applications for writs of habeas corpus, provides in pertinent part as follows:

“The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.”

ARGUMENT.

I.

The Application for Writ of Habeas Corpus Was Used as a Substitute for an Appeal From the Order Denying Appellant's Motion for Relief Under Title 18, United States Code, Section 2255.

An application for a writ of habeas corpus should not be entertained where it appears that the applicant has failed to apply for relief under Title 18, United States Code, Section 2255, or, having so applied, has been denied relief thereunder, unless it appears that the remedy thereunder is inadequate or ineffective to test the legality of detention.

18 U. S. C., Sec. 2255.

A denial of a motion to vacate judgment under Section 2255 gives the moving party no right to resort to habeas corpus inasmuch as his remedy is by appeal.

Meyers v. United States, 181 F. 2d 82, 84 (C. A. D. C., 1950);

In re Del Marmol, 221 F. 2d 565 (C. A. 9, 1955).

The District Court should have dismissed appellant's application for writ of habeas corpus.

Meyers v. United States, *supra*.

This court has held that the District Court is *without jurisdiction* to issue a writ of habeas corpus where the motion under Section 2255 has been denied.

Madigan v. Wells, 224 F. 2d 577 (C. A. Cal.), cert. den. 351 U. S. 911.

Accordingly, this appeal should be dismissed.

II.

As to the Merits, It Is Clear That Appellant Was Entitled to No Relief Inasmuch as the Federal Authorities Could Not Assert Jurisdiction Over Appellant's Person for Service of His Sentence Until December 16, 1957, When He Was Released From State Custody.

There has never been any dispute on the question of where petitioner came from when he was first brought into Federal court. He was in the Los Angeles County Jail [R. 6]. Appellant has apparently concluded that some distinction must be made in his case because he was in the custody of "municipal authorities," as distinguished from "state authorities" (Appellant's Op. Br.

pp. 21 and 27). Of course, this contention requires no answer. It was the sovereign state of California which was asserting its jurisdiction over the person of appellant, regardless of where he was held in custody.

The Federal sentence did not begin to run until December 16, 1957, when appellant was taken into custody by the United States Marshal for service of his Federal sentence from the State of California, which had exhausted its jurisdiction over the body of the appellant at that time.

Duntun v. Squier, 185 F. 2d 470 (C. A. 9);

Hayward v. Looney, 246 F. 2d 56 (10th Cir.);

United States v. Hough, 157 Fed. Supp. 771.

Conclusion.

The appeal from the order denying appellant's application for writ of habeas corpus should be dismissed. Appellant's "motion for consolidation of appeals" should likewise be dismissed for the reason that he has not prosecuted his appeal from the order denying his motion under Title 28, United States Code, Section 2255.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

*Assistant U. S. Attorney,
Chief, Criminal Division,*

GEORGE W. KELL,

*Assistant U. S. Attorney,
Attorneys for Appellee.*

No. 16330 ✓

United States
Court of Appeals
for the Ninth Circuit

CHARLES E. HOPPE, Trustee of the Estate of
Los Gatos Lumber Products, Inc., Bankrupt,
Appellant,

vs.

EMMET L. RITTENHOUSE,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

JUN - 3 1959

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SHAPRO & ROTHSCHILD,
DANIEL ARONSON, JR.,

P.O. Box 508,
Burlingame, California,

For Appellant.

GEORGE P. STEPOVICH,
131 W. Main Street,
Los Gatos, California,

For Bankrupt.

EMMETT L. RITTENHOUSE,
Rittenhouse Building,
Santa Cruz, California,

For Claimant.

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 47996—In Bankruptcy

In the Matter of:

LOS GATOS LUMBER PRODUCTS, INC., a
California Corporation,
Alleged Bankrupt.

PETITION BY CREDITORS

To: The Honorable, the Judges of the United
States District Court for the Northern District
of California:

The Petition of Robert W. Gilbreth, doing business as Gilbreth Lumber Sales; Geo. H. Wilson, Incorporated, a corporation; and J. J. Graham, all of the County of Santa Cruz, District aforesaid, respectfully shows:

That Los Gatos Lumber Products, Inc., a California corporation, has had and maintained its principal place of business at 500 Mt. Herman Road, in the County of Santa Cruz, District aforesaid, for the longer portion of the six months next preceding the filing of this Petition than in any other place; that said Respondent is not a wage earner, nor a person chiefly engaged in farming or in the tillage of the soil, and owes debts to the amount of \$1,000.00 and over, and is insolvent.

That your Petitioners are and at all times herein

mentioned were creditors of said Respondent, having provable claims against said Respondent, and not contingent as to liability and liquidated as to amount, amounting in the aggregate in the excess of any securities held by them to the sum of Five Hundred Dollars (\$500.00) or over.

That Petitioner Robert W. Gilbreth is an individual doing business as Gilbreth Lumber Sales.

That Petitioner Geo. H. Wilson, Incorporated, is a corporation.

That Petitioner J. J. Graham is an individual.

That the nature and amounts of your Petitioners' said claims are as follows:

(a) A balance due from said Respondent to Gilbreth Lumber Sales upon an open, mutual, current and book account for lumber furnished by said Petitioner to said Respondent at its special instance and request, within four years last past, in the sum of \$281.71, no part of which has been paid, notwithstanding due demand therefor has been made.

(b) A balance due from said Respondent to Geo. H. Wilson, Incorporated, a corporation, upon an open, mutual, current and book account for goods, wares and merchandise furnished by said Petitioner to said Respondent at its special instance and request within four years last past, in the sum of \$176.37, no part of which has been paid, notwithstanding due demand therefor has been made.

(c) A balance from said Respondent to J. J. Graham for rent in the sum of \$750.00, no part of which has been paid, notwithstanding due demand therefor has been made.

Your Petitioners further represent that within four months next preceding the filing of this Petition, said Los Gatos Lumber Products, Inc., committed an act of bankruptcy in that on or about the 19th day of December, 1956, said Los Gatos Lumber Products, Inc., made or suffered to be made a preferential transfer as defined in Subdivision a, Section 60, of the Bankruptcy Act, in that it made, executed and delivered to Paul Gammill, Sr., and Paul Gammill, Jr., who were then and there wholly unsecured general creditors, a mortgage of personal property belonging to Los Gatos Lumber Products, Inc., on account of an antecedent indebtedness.

Wherefore, your Petitioners pray that service of this Petition with subpoena be made upon said Respondent, Los Gatos Lumber Products, Inc., a California corporation, as provided in the Bankruptcy Act, in that said Respondent may be by this Court adjudged to be a Bankrupt within the purview of said Act.

ROBERT W. GILBRETH,
Individual Doing Business as Gilbreth Lumber
Sales;

GEO. H. WILSON, INCORPORATED,
A Corporation;

J. J. GRAHAM,

By /s/ DANIEL ARONSON, JR.,
 Their Attorney in Fact.

Duly verified.

[Endorsed]: Filed January 22, 1957, US.D.C.

[Title of District Court and Cause.]

STATEMENT OF AFFAIRS

Summary of Debts and Assets

(From the statement of the debtor in Schedules A and B.)

Schedule A.

1-a. Wages	\$ 2,844.44
1-b. (1) Taxes due United States	5,903.82
1-b. (2) Taxes due States	1,220.94
1-b. (3) Taxes due Counties, Districts and Municipalities	2,606.73
1-c. (1) Debts due any person including the United States, having priority by laws of the United States	None
1-c. (2) Rent having priority	None
2. Secured claims	118,049.29
3. Unsecured claims	208,154.77
4. Notes and bills which ought to be paid by other parties thereto	None
5. Accommodation paper	None
Schedule A, total	\$338,779.99

Schedule B.

1. Real Estate	\$ 46,498.08
2-a. Cash on hand	None
2-b. Negotiable and non-negotiable instruments and securities	None
2-c. Stock in trade	1,345.58

Schedule B.

2-d. Household goods	None
2-e. Books, prints and pictures	None
2-f. Horses, cows and other animals	None
2-g. Automobiles and other vehicles	2,750.00
2-h. Farming stock and implements	None
2-i. Shipping and shares in vessels	None
2-j. Machinery, fixtures, and tools	141,333.80
2-k. Patents, copyrights and trade-marks	None
2-l. Other personal property	None
3-a. Debts due on open accounts	3,495.64
3-b. Policies of insurance	None
3-c. Unliquidated claims	None
3-d. Deposits of money in banks and elsewhere.....	6,525.00
4. Property in reversion, remainder, expectancy, or trust	None
5. Property claimed as exempt	None
6. Books, deeds and papers	

Schedule B, total	\$201,948.10
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LOS GATOS LUMBER
PRODUCTS, INC.,

/s/ CARL MORTON,
Petitioner, President.

[Endorsed]: Filed May 13, 1957, U.S.D.C.

[Title of District Court and Cause.]

ORDER OF REFERENCE

A creditors' petition having been filed against the alleged bankrupt above named, and good cause appearing therefor,

Now, on motion of Messrs. Shapro & Rothschild, attorneys for the petitioning creditors herein,

It Is Hereby Ordered that the above-entitled proceedings be, and they are hereby referred to Hon. Bernard J. Abrott, one of the Referees in Bankruptcy, who shall be in charge thereof, and to Hon. Burton J. Wyman, as Referee in Bankruptcy, in the event said Hon. Bernard J. Abrott shall be unable to act, to take further proceedings herein in accordance with the provisions of the Bankruptcy Act; and

It Is Further Ordered that all notices required to be published in the above-entitled matter and all orders which the Court may direct to be published may be inserted in the "Watsonville Pajaronian," a newspaper published in the County of Santa Cruz, State of California, within the territorial district of this Court and in the county in which the bankrupt maintained its principal place of business.

Dated at San Francisco this day of February, 1957.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed February 26, 1957, U.S.D.C.

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

Whereas, an involuntary petition in bankruptcy was filed in the above-entitled Court on the 22nd day of January, 1957, against Los Gatos Lumber

Products, Inc., a California corporation, praying that it be adjudged a bankrupt under the Acts of Congress relating to bankruptcy; and

Now, on the motion of Messrs. Shapro & Rothschild, attorneys for the Petitioning Creditors herein, and good cause appearing therefor,

It Is Hereby Ordered that said Los Gatos Lumber Products, Inc., a California corporation, be, and it is hereby adjudged a bankrupt.

Dated: This 29th day of March, 1957.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed March 29, 1957, Referee.

[Endorsed]: Filed April 2, 1957, U.S.D.C.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon consideration of the annexed duly verified Trustee's Objection to the Proof of Secured Claim of Emmet L. Rittenhouse this date filed herein by Charles E. Hoppe, Trustee of the estate of the above-named bankrupt, and good cause appearing therefor,

It Is Hereby Ordered that Emmet L. Rittenhouse, Paul Gammill, Sr., and Paul Gammill, Jr., doing business as Gammill & Co., and each of them, do personally be and appear before Hon. Bernard J. Abrott, Referee in Bankruptcy, at his Court-

room, Room A, Civic Auditorium, Market and San Carlos Streets, San Jose, California, in said District, on the 17th day of January, 1958, at the hour of 2:00 o'clock p.m. of said day to show cause, if any there be, why the prayer of said Trustee's Objection should not be granted.

It Is Further Ordered that service of this Order may be made upon Respondents at any time not less than five (5) days prior to the return date hereof.

Dated at San Jose, in said District, this 3rd day of January, 1958.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed January 8, 1958, Referee.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTION TO THE PROOF
OF SECURED CLAIM OF EMMET L. RIT-
TENHOUSE

Comes now Charles E. Hoppe, the duly appointed, qualified and acting Trustee of the estate of the bankrupt above named and objects to the allowance herein that certain proof of secured claim heretofore filed herein by Emmet L. Rittenhouse, as Assignee of Gammill & Co., a co-partnership, in the sum of \$12,025.00, upon each and all of the following grounds:

I.

That by reason of the facts hereinafter alleged, said claimant received a preference voidable under the provisions of Section 60a and b of the Bankruptcy Act and under the provisions of Section 57g of said Act; therefore, said claim should not be allowed as a secured claim but only as a general unsecured claim.

II.

That the above-entitled proceedings were commenced herein by the filing of an involuntary petition against the above-named bankrupt on the 22nd day of January, 1957. That thereafter such proceedings were regularly and duly had in the above-entitled matter as that the undersigned, Charles E. Hoppe, was duly appointed as and thereafter duly qualified as and ever since has been and still is the duly appointed, qualified and acting Trustee of the estate of said bankrupt.

III.

That within four months next preceding the said 22nd day of January, 1957, and while said Los Gatos Lumber Products, Inc., a California corporation, was then and there insolvent, said bankrupt transferred a portion of its property to said claimant's Assignor, Paul Gammill, Sr., and Paul Gammill, Jr., doing business as Gammill & Co., in that more particularly and on the 3rd day of December, 1956, said bankrupt made, executed and delivered to said claimant's Assignor a mortgage of chattels covering certain of its personal property and which

said mortgage of chattels was thereafter and on the 19th day of December, 1956, recorded in Volume 1107, Official Records of Santa Cruz County, California, at page 586; that said mortgage was given without any current, or fair, consideration, and on account of an antecedent indebtedness. That said chattel mortgage was thereafter assigned to claimant herein by said Paul Gammill, Sr., and Paul Gammill, Jr., doing business as Gammill & Co.; that at the time of the aforesaid transfer claimant's Assignor was a general and wholly unsecured creditor of said bankrupt and that the effect of said transfer was to enable said claimant's Assignor to obtain a greater percentage of its debt than other then and now existing general and wholly unsecured creditors of said bankrupt; that at the time of said transfer said claimant's Assignor well knew and/or had reason to believe that the effect of said transfer would be to so enable said claimant's Assignor to obtain said preference.

IV.

In toto that said mortgage of chattels is invalid as against your Petitioner, as such Trustee, by reason of the unreasonable and unexplained delay between the date of execution thereof on December 3, 1956, and the date of recordation thereof on December 19, 1956.

V.

That other general and wholly unsecured creditors of said bankrupt have heretofore proved and filed herein their several proofs of claim and that

the assets of said bankrupt estate are insufficient to pay such unsecured claims of said creditors in full.

Wherefore, said Trustee prays that the foregoing objections to said proof of secured claim of said Emmet L. Rittenhouse, Assignee of Paul Gammill, Sr., and Paul Gammill, Jr., doing business as Gammill & Co., be, after due hearing, sustained; that said proof of secured claim be disallowed in toto as such and allowed herein only as a general unsecured claim; that said Trustee recover his costs and expenses herein incurred; or for such other, further and additional order as to this Honorable Court may seem proper in the premises.

/s/ CHARLES E. HOPPE,
Trustee.

SHAPRO & ROTHSCHILD,

By /s/ DANIEL ARONSON, JR.,
Attorneys for Trustee.

Duly verified.

[Endorsed]: Filed January 8, 1958, Referee.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Emmet L. Rittenhouse having heretofore filed a secured claim in the sum of \$12,025.00 in the estate of the bankrupt above named and the Trustee hav-

ing filed objection to the proof of the said secured claim and issue thereon having been joined and a hearing upon the issues having been had by me on the 31st day of January, 1958, and thereafter regularly continued and concluded upon the 21st day of February, 1958, and evidence both oral and documentary having been submitted by the parties in interest and due consideration having been had thereon, I find as follows:

Findings of Fact

1. On the 22nd day of January, 1957, proceedings were commenced herein by the filing of an involuntary petition against the above-named bankrupt.

2. Between October 4, 1956, and December 3, 1956, and thereafter Gammill & Company, a co-partnership consisting of Paul Gammill, Sr., and Paul Gammill, Jr., advanced moneys and credit to the above-named bankrupt in a sum in excess of \$25,000.00.

On the third day of December, 1956, the above-named bankrupt signed a promissory note and chattel mortgage together with a Notice of Intended Mortgage of Chattels which notice recited that said corporation intended to mortgage to Gammill & Company certain machinery and equipment and other personal property and that the consideration therefor would be given on the 14th day of December, 1956. On the 14th day of December, 1956, the said note and chattel mortgage were delivered

to Gammill & Company. On the 14th day of December, 1956, Gammill & Company delivered the said notice and chattel mortgage to Emmet L. Rittenhouse, the claimant herein, pursuant to an assignment thereof dated December 3rd, 1956, and thereafter on December 19, 1956, the said chattel mortgage was duly recorded in the office of the County Recorder in and for the County of Santa Cruz.

3. The period of time elapsing between the 14th day of December, 1956, on which the said promissory note and chattel mortgage were executed by delivery and the 19th day of December, 1956, on which the said chattel mortgage was recorded, is not unreasonable.

4. On the 14th day of December, 1956, the records of the above-named bankrupt disclosed an item entitled, "Notes Payable Officers," totalling the sum of \$173,813.12. This item represented advances made by members of the family of Carl Morton, President of the Bankrupt corporation, which advances had been made at various times and in varying amounts but which in fact totalled the said sum of \$173,813.12. These sums were advanced to the corporation not as loans but as equity capital in the form of subscriptions to capital stock. Stock certificates were never issued by the Bankrupt corporation to the various members of the family of Carl Morton to evidence the said advances.

5. The fair market value of the property of the subject corporation on the 14th day of December, 1956, exceeded the liabilities of the corporation on that date. The net worth of the Bankrupt corporation on the 14th day of December, 1956, was approximately \$62,000.00.

6. Shortly prior to the 14th day of December, 1956, Paul Gammill, Sr., and Paul Gammill, Jr., inquired of Carl Morton in his capacity as president of the Bankrupt corporation and Patricia Morton in her capacity as the holder of \$82,568.32 of the item appearing in the balance sheet of the Bankrupt corporation as "Notes Payable Officers," and of George Stepovich, Esq., an attorney-at-law in his capacity as attorney for the Bankrupt corporation, as to the character of the apparent indebtedness of the Bankrupt corporation set forth in its balance sheet as "Notes Payable Officers" and totalling the sum of \$173,813.12. The said Paul Gammill, Sr., and Paul Gammill, Jr., were upon such inquiry advised that the said item of apparent indebtedness totalling \$173,813.12 did not represent a fixed indebtedness of the corporation but in fact represented equity capital of the corporation which was ultimately to be evidenced by the issue to the holders thereof of the capital stock of the corporation. The said Paul Gammill, Sr., and Paul Gammill, Jr., relied upon such advice and representation and their reliance thereon was reasonable.

7. Paul Gammill, Jr., and Paul Gammill, Sr., had no reasonable cause to believe that the Bank-

rupt corporation was not solvent on the 14th day of December, 1956.

8. The estate of the Bankrupt corporation is not sufficient to satisfy the claims of the unsecured creditors of the Bankrupt corporation and the allowance of the claimants chattel mortgage as a secured claim against the Bankrupt corporation will permit the claimant to secure a greater percentage of his claim than if such claim were held to be unsecured.

Conclusions of Law

1. The promissory note and mortgage of chattels securing the same created a valid secured obligation on the part of the bankrupt corporation to which by reason of a valid assignment the claimant, Emmet L. Rittenhouse, is now entitled.

2. The preference created by the subject promissory note and chattel mortgage is not voidable under the provisions of Sections 57g, 60a or 60b of the Bankruptcy Act or under any of them and such claims should, therefore, be allowed by the Trustee herein as a secured claim.

3. The bankrupt corporation was solvent within the meaning of Section 1(19) of the Bankruptcy Act on the 14th day of December, 1956, the date on which the subject promissory note and chattel mortgage were executed.

4. Paul Gammill, Sr., and Paul Gammill, Jr., a co-partnership doing business as Gammill & Company, the assignors of claimant of the subject

promissory note and chattel mortgage, had no reasonable cause on the 14th day of December, 1956, to believe the bankrupt corporation was insolvent within the meaning of Section 1(19) of the Bankruptcy Act.

Dated August 4, 1958.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 4, 1958, Referee.

[Title of District Court and Cause.]

ORDER ALLOWING SECURED CLAIM

This matter coming on for hearing upon the proof of claim of Emmet L. Rittenhouse filed in the above-entitled cause and the objections of the trustee of the estate thereto and due notice of said hearing having been given to said claimant, and to the said trustee, and the said claimant and the trustee having appeared by counsel on said day, and evidence having been submitted and after hearing adverse interests,

It Is Ordered, that the objections of the trustee to the allowance of the proof of claim of said claimant be, and the same are hereby denied.

It Is Further Ordered that the claim of Emmet

L. Rittenhouse be, and it hereby is allowed as a secured debt in the amount of \$12,025.00.

Dated at Oakland, California, this 4th day of August, A.D. 1958.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed August 4, 1958, Referee.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND
ORDER ALLOWING SECURED CLAIM

The undersigned, one of the Referees in Bankruptcy, in accordance with the provisions of Section 39 a (8) of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings

That on the 22nd day of January, 1957, an involuntary petition in bankruptcy was filed with the above-entitled Court against Los Gatos Lumber Products, Inc., a corporation, and on the 29th day of March, 1957, said Los Gatos Lumber Products, Inc., was duly adjudged bankrupt, and the matter was referred to the undersigned Referee to take

such further proceedings as might be required under the provisions of the Bankruptcy Act.

That thereafter, and on the 31st day of May, 1957, Charles E. Hoppe, of the City of San Jose, State of California, District aforesaid, was appointed Trustee of the estate of said bankrupt, and thereafter duly qualified as such Trustee.

That thereafter, and on the 8th day of January, 1958, Charles E. Hoppe, as such Trustee, filed with the above-entitled Court his Objections to the Proof of Secured Claim of Emmet L. Rittenhouse, and on the same day the undersigned Referee in Bankruptcy issued an Order to Show Cause on said Objections, which Order to Show Cause fixed the 17th day of January, 1958, as the date for the hearing of said Trustee's Objections (the original of which Objections and Order to Show Cause are forwarded herewith as part of this Certificate); that by stipulation between the parties and with the consent of the undersigned Referee in Bankruptcy, the hearing on the Order to Show Cause was continued from time to time.

That after hearing the evidence and considering the authorities, the undersigned Referee made his Findings of Fact and Conclusions of Law and Order Allowing Secured Claim on the 4th day of August, 1958 (the original of which Findings of Fact and Conclusions of Law and Order Allowing Secured Claim are forwarded herewith as part of this Certificate).

II.

Statement of Facts

The facts as developed on the hearings of said matter and as set forth in the Reporter's Transcript of said hearing (the original of which Reporter's Transcript is forwarded herewith as part of this Certificate) are:

Between October 4, 1956, and December 3, 1956, the date promissory note and mortgage of chattels hereinafter referred to bear, and after December 3, 1956, Claimant's assignors, Gammill & Company, advanced moneys and/or credit to Los Gatos Lumber Products, Inc., a California corporation, hereinafter referred to as the Corporation, in a sum in excess of \$25,000, one of the sources of such funds being from Cyril S. Kelly, Jr., and Marjorie G. Kelly, who desired to be paid by Gammill & Company the sums due them from Gammill & Company.

On December 3rd, 1956, the Corporation signed a promissory note and chattel mortgage, together with a Notice of Intended Mortgage of Chattels, which Notice recited that said Corporation intended to mortgage to Gammill & Company certain machinery and equipment and other personal property, and that the consideration therefor would be given on December 14th, 1956; that after said 14th day of December, 1956, said note and chattel mortgage, together with an assignment of same were delivered to this claimant, and that said chattel

mortgage was duly recorded on December 19th, 1956.

That at all times the Corporation was in need of additional working capital to carry on its business operations. Claimant's assignors knew of the need of the Corporation for additional working capital and assisted the Corporation in various efforts to obtain financing and were familiar with the value of the assets and equipment of the Corporation; and were advised at all times by the Corporation through its president, Carl Morton, Patricia Morton, the wife of Carl Morton, and the Corporation's attorney, George Stepovich, that the advances of capital made by members of the Morton family, totalling \$173,813.12, shown on the financial statements of the Corporation, were to be considered only as equity capital of the Corporation, and that said advances should be considered as stock of the Corporation held by members of the Morton family having made these advances.

III.

Hearings

At the time and places fixed for the hearing of said Trustee's Objections, there appeared before the undersigned, Daniel Aronson, Jr., Esq., of Shapro & Rothschild, San Francisco, California, for the Trustee, and Emmet L. Rittenhouse, Esq., of Santa Cruz, California, for the claimant. Said matter was heard and considered by the under-

signed upon the records and pleadings as herein-above set forth.

IV.

Referee's Findings

1. On the 22nd day of January, 1957, proceedings were commenced herein by the filing of an involuntary petition against the above-named bankrupt.

2. Between October 4, 1956, and December 3, 1956, and thereafter, Gammill & Company, a copartnership consisting of Paul Gammill, Sr., and Paul Gammill, Jr., advanced moneys and credit to the above-named bankrupt in a sum in excess of \$25,000.00.

On the third day of December, 1956, the above-named bankrupt signed a promissory note and chattel mortgage together with a Notice of Intended Mortgage of Chattels which notice recited that said corporation intended to mortgage to Gammill & Company certain machinery and equipment and other personal property and that the consideration therefor would be given on the 14th day of December, 1956. On the 14th day of December, 1956, said note and chattel mortgage were delivered to Gammill & Company. On the 14th day of December, 1956, Gammill & Company delivered the said note and chattel mortgage to Emmet L. Rittenhouse, the claimant herein, pursuant to an assignment thereof dated December 3, 1956, and thereafter on December 19, 1956, the said chattel mortgage was duly re-

corded in the office of the County Recorder in and for the County of Santa Cruz.

3. The period of time elapsing between the 14th day of December, 1956, on which the said promissory note and chattel mortgage were executed by delivery and the 19th day of December, 1956, on which the said chattel mortgage was recorded, is not unreasonable.

4. On the 14th day of December, 1956, the records of the above-named bankrupt disclosed an item entitled, "Notes Payable Officers," totalling the sum of \$173,813.12. This item represented advances made by members of the family of Carl Morton, President of the Bankrupt corporation, which advances had been made at various times and in varying amounts, but which in fact, totalled the said sum of \$173,813.12. These sums were advanced to the corporation not as loans but as equity capital in the form of subscriptions to capital stock. Stock certificates were never issued by the bankrupt corporation to the various members of the family of Carl Morton to evidence the said advances.

5. The fair market value of the property of the subject corporation on the 14th day of December, 1956, exceeded the liabilities of the corporation on that date. The net worth of the bankrupt corporation on the 14th day of December, 1956, was approximately \$62,000.00.

6. Shortly prior to the 14th day of December, 1956, Paul Gammill, Sr., and Paul Gammill, Jr., in-

quired of Carl Morton in his capacity as president of the bankrupt corporation and Patricia Morton in her capacity as the holder of \$82,568.32 of the item appearing in the balance sheet of the bankrupt corporation as "Notes Payable Officers," and of George Stepovich, Esq., an attorney at law, in his capacity as attorney for the bankrupt corporation as to the character of the apparent indebtedness of the bankrupt corporation set forth in its balance sheet as "Notes Payable Officers" and totalling the sum of \$173,813.12. The said Paul Gammill, Sr., and Paul Gammill, Jr., were upon such inquiry, advised that the said item of apparent indebtedness totalling \$173,813.12 did not represent a fixed indebtedness of the corporation, but, in fact, represented equity capital of the corporation which was ultimately to be evidenced by the issue to the holders thereof of the capital stock of the corporation. The said Paul Gammill, Sr., and Paul Gammill, Jr., relied upon such advice and representation and their reliance thereon was reasonable.

7. Paul Gammill, Jr., and Paul Gammill, Sr., had no reasonable cause to believe that the bankrupt corporation was not solvent on the 14th day of December, 1956.

8. The estate of the bankrupt corporation is not sufficient to satisfy the claims of the unsecured creditors of the bankrupt corporation and the allowance of the claimants chattel mortgage as a secured claim against the bankrupt corporation will permit the claimant to secure a greater percentage

of his claim than if such claim were held to be unsecured.

V.

Statement of Question Presented

The question involved between the parties, which question, by his Order of August 4, 1958, the undersigned Referee answered in the negative, is:

“Is the Chattel Mortgage herein questioned, preferential within the meaning of Sections 60 a and b of the Bankruptcy Act?”

VI.

Petition for Review

That on the 29th day of August, 1958, and within the time allowed by the Court therefor, by an Order of the undersigned Referee in Bankruptcy, said Trustee, Charles E. Hoppe, filed his Petition for Review (which original Petition for Review is forwarded herewith as part of this Certificate) of the Undersigned Referee's Order Allowing Secured Claim.

VII.

Original Documents Accompanying Certificate

1. Trustee's Objections to Proof of Secured Claim of Emmet L. Rittenhouse, and Order to Show Cause issued thereon.

2. Findings of Fact and Conclusions of Law and Order Allowing Secured Claim.

3. Reporter's Transcript of Testimony.

4. Trustee's Exhibit No. 1—Balance Sheet as of July 31, 1956.

5. Trustee's Exhibit No. 2—Balance Sheet as of January 31, 1957.

6. Respondent's Exhibit No. 1—Voting Trust Agreement.

7. Respondent's Exhibit No. 2—Letter to Carl Morton.

8. Respondent's Exhibit No. 3—Appraisal.

9. Respondent's Exhibit No. 4—Portions of Small Business Administration Loan application.

10. Trustee's Opening Memorandum in Support of Objections to Proof of Secured Claim.

11. Claimant's Reply Memorandum to said Objections to Proof of Secured Claim.

12. Trustee's Closing Memorandum in Support of Objections to Proof of Secured Claim.

13. Petition for Review.

Dated at Oakland, California, in said District, this 24th day of November, 1958.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed November 26, 1959, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF HEARING

Notice is Hereby Given that the Referee's Certificate on Petition to Review of Findings of Fact and Conclusions of Law and Order Allowing Secured Claim was forwarded to the Clerk of the above-entitled Court on the 25th day of November, 1958, and in the ordinary course of events should be on the calendar in the Post Office Building, San Francisco, California on the 15th day of December, 1958, at 9:30 o'clock a.m., under the provisions of Rules of Practice of District Court of the United States, Northern District of California (Bankruptcy Rules, Rule 10) effective April 1, 1955. It is suggested that Counsel representing the interested parties should check with the Clerk of the Court (Southern Division, at San Francisco) to make certain that said matter will come on for hearing on said above-mentioned date.

Dated: November 25, 1958.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed November 25, 1958, Referee.

[Endorsed]: Filed November 26, 1958, U.S.D.C.

In the United States District Court for the Northern District of California, Southern Division

No. 47996—In Bankruptcy

In the Matter of

LOS GATOS LUMBER PRODUCTS, INC., a
California Corporation,

Bankrupt.

ORDER

The Trustee's petition for review raises questions of fact which were decided by the Referee on conflicting evidence. The Court cannot say that the findings of the Referee were "clearly erroneous" as that term is used in General Order 47. Therefore, the order of the Referee should be affirmed.

It is Ordered that the order of the Referee of August 4, 1958, be and the same is hereby affirmed.

Dated: December 19, 1958.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed December 19, 1958, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that Charles E. Hoppe, the duly appointed, qualified and acting Trustee of the estate of the above-named bankrupt hereby appeals the United States Court of Appeals for the Ninth Circuit from the Order of Honorable Oliver

J. Carter, Judge of the above-entitled Court, signed and filed herein on the 19th day of December, 1958, affirming the Order allowing secured claim made by Honorable Bernard J. Abrott, one of the Referees in Bankruptcy of the above-entitled Court on the 4th day of August, 1958, and from the whole thereof.

Dated at San Francisco, in said District, this 30th day of December, 1958.

SHAPRO & ROTHCHILD,

By /s/ DANIEL ARONSON, JR.,
Attorneys for Charles E. Hoppe, Trustee of the
Estate of Los Gatos Lumber Products, Inc.,
Bankrupt.

[Endorsed]: Filed December 31, 1958, U.S.D.C.

In the Southern Division of the United States District Court, for the Northern District of California

No. 47996—In Bankruptcy

In the Matter of

LOS GATOS LUMBER PRODUCTS, INC.,
Alleged Bankrupt

San Jose, California. January 31, 1958.

HEARING ON ORDER TO SHOW CAUSE
(Objection to Claim of Emmet L. Rittenhouse)

Before Hon. Bernard J. Abrott, Referee in Bankruptcy,

Appearances:

DANIEL ARONSON, JR, ESQ.,
SHAPRO AND ROTHSCILD,
For the Trustee.

EMMET L. RITTENHOUSE, ESQ.

The Court: In the Matter of Los Gatos Lumber Products, Inc.

Mr. Rittenhouse: Ready.

Mr. Aronson: Yes. Your Honor, this is an objection to proof of secured claim, the claim being filed by Emmet L. Rittenhouse, as the Assignee of Gammill & Co., a co-partnership. The objection is not to the allowance of the claim, but only to its allowance as a secured claim—the grounds being, No. 1, that there is a preference within the meaning of the Bankruptcy Act; and No. 2—unreasonable and unexplained delay between the date of execution and date it was filed before the hearing. The claim filed is not here. (Addressing Mr. Rittenhouse): Do you have the original?

Mr. Rittenhouse: I have the originals.

Mr. Aronson: We will introduce the copies; we don't have to prove up all the documents.

Mr. Rittenhouse: Stipulate they are all in order.

The Court: So there will be no misunderstanding that they are all in order you are still reserving one of the dates of the recordation?

Mr. Aronson: That they purport to be in the dates as indicated.

The Court: You gentlemen will stipulate, and identify the documents for the record.

Mr. Aronson: A promissory note, \$12,025.00, dated 12-3-56, executed—this is the note executed by the Central Coast Lumber Sales, Inc., to Cyril S. and Margery G. Kelly, guaranteed by Mr. Paul Gammill, Jr.; Mortgage of Chattels, dated December [1*] 3, 1956, executed by the Bankrupt to the Gammills, doing business as Gammill & Company, being recorded December 19, of 1956. Then there is the promissory note for \$12,025.00 also dated December 3, 1956, executed by the Bankrupt to the Gammill Company, or order, and the assignment of the promissory note and chattel mortgage from the Gammills to Mr. Rittenhouse——

Mr. Rittenhouse: As security——

Mr. Aronson: ——for the Kelly Company——

The Court: Date?

Mr. Aronson: December 3, 1956; it also bears a recording date of December 19, 1956. And the last document is an Affidavit of Publication of Intended Sale of Mortgage and Chattels, showing the date of Notice of Intended Sale—date of Publication. December 4, 1956.

The Court: Both of you gentlemen will stipulate that the documents will have the same effect as if received in evidence?

Mr. Rittenhouse: So stipulated.

Mr. Aronson: So stipulated. I will take up my case first. I will call Mr. Paul Gammill, Jr., under Section 21J.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

PAUL GAMMILL, JR.

called as a witness on behalf of the Trustee, sworn and examined, testified as follows:

Direct Examination

By the Court:

Q. Your name is Paul Gammill, Jr.?

A. Yes.

Q. Is your address the same as when you were here before? A. Yes, sir. [2]

By Mr. Aronson:

Q. Mr. Gammill, you are one of the partners of Gammill & Company? A. Yes, sir.

Q. You are also connected with Central Coast Lumber Sales—you are an officer?

A. Right.

Q. And you are also connected with the sales?

A. The sales company?

Q. You are connected with a third business name, are you not?

A. Central Coast Lumber Sales, and Gammill & Company; as to the amount of stock held in Los Gatos Lumber Products, Inc.—

Q. But other than Los Gatos Lumber Products, Inc., there are just two; is that right?

A. That is right.

Q. Now you—when I refer to you, I am referring to the two companies specifically and not to you personally—over a period of time advanced, either by credit or by check, sums of money to the bankrupt? A. Right, sir.

(Testimony of Paul Gammill, Jr.)

Q. According to the claim filed by Mr. Rittenhouse, between October 4th and December 3rd, 1956, you advanced money to, or for the account, or for or on behalf of the bankrupt, for the purpose of assisting the bankrupt to stay in business until it was refinanced? A. Right, sir.

Q. Do you know the amount of money that was advanced during that period of time?

A. I can tell you the total amount advanced to Los Gatos Lumber Company from October 4th to January 15th—the last of our advances.

Q. What was that amount?

A. Approximately \$29,000.00. [3]

Q. Was that all by check?

A. That was all by check, yes, sir.

Q. I have all the checks and I have the totals; you are correct. The reason I wanted to know is that I ran a tape on the checks between the dates of October 4th and December 3rd of 1956—a total of \$25,381.26? A. Right.

Q. And then there were additional checks issued after that? A. Right, sir.

Q. And in addition to that you did business, did you not, with the bankrupt by lumber sales, not by money advances? A. By logging.

Q. Were you here at the examination of your father? A. It was my examination.

Q. Do you remember showing the books with the items during that time? By that I mean between October 4th and December 3rd.

A. No, sir, I don't. I can tell you approximately

(Testimony of Paul Gammill, Jr.)

from the inception of the logging company up to the end.

Q. How much was it?

A. Roughly \$28,000.00 in the logs.

Q. That is, you filed your claim for that?

A. Right; it was the Gammill Company that filed that.

Q. If I told you that during the period of October 4th to November 15th, from your books, it shows \$12,562.78—would you have any serious disagreement with that amount?

Mr. Rittenhouse: From whose books?

Mr. Aronson: From Gammill Company's books.

A. No—I don't understand.

Q. I say, from your examination a month or so ago, when you [4] had your books here, I abstracted the information from the books showing that from the first entry of October 4th to the last entry within the dates that I am concerned with right now, of November 15th, the total charges against the account of the bankrupt was \$12,562.78, which would be a portion of the \$28,000.00, would you say that would be approximately correct?

A. To my knowledge, I don't know; I just don't know all these things.

Q. But there was no question, Mr. Gammill, that by either money, or through logging operations, you extended credit or money to the bankrupt substantially in excess of \$12,000.00?

A. Right.

(Testimony of Paul Gammill, Jr.)

Q. And that was all done on an unsecured basis; you have no security?

A. Other than the chattel mortgage.

Q. Other than the question of the chattel mortgage that is here? A. Right.

Q. You obtained the chattel mortgage from the bank, and it is dated December 3rd; you have also a promissory note on that date. What were the circumstances leading up to the execution of the note and mortgage?

A. My cousin, Cyril Kelly, whom the company assigned the promissory note to, put up \$25,000.00, and my father and I put up \$25,000.00 to form the Central Coast Lumber Sales. Prior to that my father was engaged in the logging business. After forming a sales company and advancing money to the logging operations, my cousin, I would say in the latter part of November, wanted to get out of business. At that time we had advanced [5] considerable money to Los Gatos Lumber Products, and it was our knowledge at the time and we felt sure that an FHA loan would be granted to Los Gatos Lumber Products to whom we had advanced money; Kelly wanted his \$25,000.00 back, but since we had considerable money in the Los Gatos Lumber Products and in the logging operations, it would be impossible to give him the \$25,000.00 back in cash.

Q. Why would it be impossible?

A. Well, we had loaned most of the money to the Los Gatos Company.

(Testimony of Paul Gammill, Jr.)

Q. When you say it would be impossible for you, you mean Gammill Company?

A. Gammill Company. We had no intention of pressing the Los Gatos Lumber Products; we felt it would be refinanced, or later on sold, but in order to give Kelly some security to back the \$25,000.00, my father entered into negotiations back in Mississippi making it possible to get \$8,500.00 cash; we asked the Los Gatos Lumber Products to secure \$12,000.00 of the \$25,000.00 debt owing us, and also Kelly and we issued him a check of \$3,500.00, which would keep the business together; in other words, it wouldn't pull it apart.

Q. Did you ask the bankrupt for the payment of \$25,000.00, \$12,000.00, or any sum at all to pay Kelly his money?

A. No; we didn't; we just asked for security.

Q. Why didn't you ask for it?

A. We had everything to lose in that respect; we felt the [6] business was a going concern and we felt that capital would be granted by an FHA loan.

Q. You felt they were solvent?

A. Yes, sir.

Q. You knew that they were seeking refinance?

A. Right—without participating in it.

Q. You were closely associated in that direction?

A. Right.

Q. You knew that they were seeking refinancing from the Small Business Administration?

A. Right.

(Testimony of Paul Gammill, Jr.)

Q. And that they didn't have the cash; as a matter of fact they couldn't—

A. They didn't have the absolute cash, but as far as assets and liabilities, I considered them solvent.

Q. Didn't you oppose the giving of the mortgage by the bankrupt, Mr. Gammill?

A. Oppose it?

Q. On the basis that it would interfere with the financing operation of the FHA loan?

A. No, sir; I didn't.

Q. You didn't? A. No, sir.

Q. Who went to the bankrupt to ask for the promissory note; did you, or Mr. Kelly, or Mr. Rittenhouse, or your father—or who was it?

A. Well, it was quite a group; there was my cousin, Dave Gammill, I believe my father, Sid. Kelly, Mr. Rittenhouse here, and Mr. Bennett, who was the attorney acting at that time for the Gammills, and myself.

Q. (By Mr. Rittenhouse): Was there any discussion at that time of the financial condition of the bankrupt?

A. I think I was well aware of the condition of the company— [7] if you could put it that way; we discussed it at length about the chattel mortgage and no one felt it would hurt the business as far as any future sale—it wasn't as if we had asked for a total indebtedness loan.

Q. How was the sum of \$12,025.00 reached?

A. I think I mentioned that Kelly had \$25,-

(Testimony of Paul Gammill, Jr.)

000.00 in it and he wanted the amount coming to him back. Having invested most of our money in the Los Gatos Lumber Products—in our own company, and money loaned to Los Gatos Lumber Products—in order to continue our operation; we also hoped to continue loaning funds to Los Gatos Lumber Products, advancing funds, and we couldn't give Mr. Kelly any \$22,000.00, so the figure of \$12,-000.00 was reached, and my father put up an additional \$8,500.00, which would make roughly \$20,-000.00, and Central Coast Lumber Sales issued a check for, I believe, \$2,300.00 to bring it up to the \$22,000.00 of Kelly's investment.

Q. At this time were you an officer and director of the bankrupt? A. No, sir.

Q. When did you cease being an officer of record?

A. In April, I believe it was April 2nd, 1956.

Q. If I understand your testimony you say that you had every reason to believe the bankrupt was solvent at that time?

A. Well, I would say it was solvent, yes, sir; I felt that through a sale, or the possibility of re-financing, and our advancing money it would carry on quite successfully?

Q. At about December 3rd, 1956——

A. I would class it as [8] solvent.

Q. By "solvent," what do you mean?

A. That the assets would exceed the liabilities.

Q. You believe that? A. Yes, sir.

(Testimony of Paul Gammill, Jr.)

Q. And you believe they were perfectly capable of continuing business?

A. Well, with additional finance, yes.

Q. With additional finance?

A. Well, in that respect I am speaking of the current small advances we were making.

Q. I am talking about the over-all picture. You knew there was a necessity for the refinancing and obtaining the loan to stay in business?

A. To stay in business, yes.

Q. The lumber operation was not in very good shape in December, 1956?

A. It was not at its best at the end of any year, but it was better than it was at the beginning of 1957.

Q. As a matter of fact, around the same time that these transactions took place you were collecting the accounts receivable of the bankrupt, weren't you?

A. No, sir; I never collected money.

Q. You attempted to?

A. I attempted to, yes.

Mr. Aronson: I think I have nothing further of Mr. Gammill at this time.

Mr. Rittenhouse: If I may, I would like to examine Mr. Gammill now.

The Court: Yes, Mr. Rittenhouse. [9]

(Testimony of Paul Gammill, Jr.)

Cross-Examination

By Mr. Rittenhouse:

Q. Mr. Gammill, during the negotiations before December 30, 1956, leading up to the 3rd of December, 1956, you were represented by a Mr. Bennett—Attorney Bennett? A. Right, sir.

Q. And at that time I was urging the claim of Mr. Kelly and his mother, Mrs. Kelly, is that correct? A. Yes, sir.

Q. And on or about December 3rd we arrived at a solution for the settlement of that particular claim? A. Yes.

Q. These papers, or these documents, represent that; is that correct? A. Yes, sir.

Q. The balance of the \$12,025.00 and \$10,800.00 represent the balance, unpaid balance due from you and your father to Mr. Kelly and his mother?

A. That is right.

Q. Now, in order to satisfy Mr. Rittenhouse and his client, you secured for my satisfaction this assignment, rather this chattel mortgage and the note which was later on assigned to me in trust for the purpose of applying any proceeds onto the debt that was due from you to the Kellys; that is correct, isn't it? A. Right, sir.

Q. Now, we discussed the matter of publication of notice under Section 3440 of the Civil Code specifically, didn't we? A. Yes, sir.

Q. (By Mr. Aronson): Were these conversa-

(Testimony of Paul Gammill, Jr.)

tions in the presence of Mr. Morton or some other representative of the bankrupt?

A. No; they weren't; Mr. Morton was never at any of these [10] conferences.

Mr. Aronson: Then I object to that as incompetent, irrelevant, and immaterial.

Q. (By Mr. Rittenhouse): Well, in any event, the Exhibit here—which is the Affidavit of Publication, and which is in evidence, shows that this transaction was to be consummated on the 14th day of December.

Mr. Aronson: I can make it very simple for you as far as that is concerned, Mr. Rittenhouse, and there need be no testimony, because the documents speak for themselves.

Mr. Rittenhouse: I wanted it in the record.

Mr. Aronson: Merely the requirement of publication of such notice and not lack of explanation of publication—it is purely a matter of law as to whether there was a delay; the documents speak for themselves.

Mr. Rittenhouse: I want to bring out that the mortgages were to be delivered on the 14th day of December, 1956, with reference to their recording date in the next week which accounts for the delay, and which is one of his points. The 14th was a Friday.

Mr. Aronson: Hearsay.

Q. (By Mr. Rittenhouse): Now, with reference to your opinion as to the solvency of this particular Los Gatos Lumber Products Company, Mr. Gam-

(Testimony of Paul Gammill, Jr.)

mill, did you have occasion on October 8th, 1956, to have an appraisal, or to see an appraisal of the assets of this particular company?

A. Yes, sir.

Q. Might I show you this particular document and ask you if you [11] have seen anything like that before?

A. Yes, sir; different form, yes, sir.

Q. Why was this made?

A. To determine the appraisal value for the Small Business Administration.

Q. Who made the appraisal?

A. California Appraisal Company.

Q. Did you assist in the appraisal in any way?

A. No, sir; I didn't; I was present during the signing of this particular——

Q. (By Mr. Aronson): Was this document you are referring to made for the bankrupt?

A. Right, sir.

Q. I mean, did the bankrupt cause it to be made?

Mr. Rittenhouse: At the time of this particular reference to the Small Business Administration, or small business deal.

Q. (By Mr. Rittenhouse): Now, with reference to recapitulation, what are the total values of the assets of this particular operation, without regard to their inventories or cash or various things of that nature?

Mr. Aronson: Are you going to read from that? (Indicating document.)

(Testimony of Paul Gammill, Jr.)

A. Yes.

Mr. Aronson: I object to it as incompetent, irrelevant, and immaterial.

Mr. Rittenhouse: What do you want me to do—call the appraiser down here? (Discussion.)

The Court: On the record. Let the record show that there is now marked for identification an appraisal, Los Gatos Lumber [12] Products Company; it was accompanied by a document on the letterhead of California Appraisal Company, and is dated October 8th, 1956—and when I say “marked for identification,” that is without prejudice to either the petitioner or the respondent to offer it in evidence.

Q. (By Mr. Rittenhouse): Your testimony was that you saw the original of this document?

A. Yes, sir.

Q. And the values made by this appraisal form, as set forth in the recapitulation of the assets, excluding the inventory and cash, are as follows; is that correct? A. Right, sir.

Q. In other words—new recapitulation values, \$199,350.35? A. Correct.

Q. Sound values, \$173,506.11; insurable values, \$160,900.25. I will ask you whether or not we might also go through the same routine with this particular document as with this one; it is a financial statement as of July, 1956?

Mr. Aronson: Prepared by the bankrupt?

Mr. Rittenhouse: Prepared by American Audit

(Testimony of Paul Gammill, Jr.)

Company at the request of the bankrupt corporation.

Mr. Aronson: If they are the same.

The Court: For identification.

Q. (By Mr. Rittenhouse): Did you ever see this document before? A. Yes, sir.

Q. Did you see it on or before these advances were made—say, in August, 1956?

A. Prior to the advances, yes. I don't know the exact date I saw it, but it was in the neighborhood. [13]

Q. And the total asset value set forth by this particular document is \$249,516.52?

A. Yes, sir.

Q. Now, with reference to the fixed liabilities there is a notation there of \$173,813.12?

A. Yes, sir.

Q. What did that represent?

A. Well, that represented—I don't know about the total amount but that particular figure represents moneys advanced to the corporation.

The Court: Let the record show that the Court has interrupted Mr. Rittenhouse's examination of Mr. Gammill, Jr., to afford counsel for the petitioner or respondent an opportunity to call Mr. Morton.

CARL MORTON

called as a witness on behalf of the Trustee, sworn and examined, testified as follows:

Direct Examination

The Court: What is your full name?

A. Carl Morton.

Q. And your address is still La Jolla?

A. 1706 Harrison.

By Mr. Aronson:

Q. You were the president of the bankrupt corporation? A. That is right.

Q. Did you have occasion to have a conversation with the Gammills and Kellys in December, 1956?

A. Right.

Q. What was the substance of that conversation?

A. Well, in essence, Sid Kelly desired to leave the business——

Mr. Rittenhouse: Identify your business. [14]

A. Well, he desired to leave Central Coast Lumber Sales which he was tied in with Mr. Gammill, Jr., of the company—and he simply wanted “out,” and he wanted his money back.

Q. Did they ask you for the money?

A. No.

Q. Did they ask you only for the chattel mortgage?

A. We discussed it at some length, and that was the upshot of the method of technique in this particular instance where Kelly was involved.

(Testimony of Carl Morton.)

Q. Was there a discussion of your ability to pay cash?

A. Yes; I think there was because it was common knowledge; we had discussed this at some length as to what our cash finances were.

Q. So it was decided that you were giving Kelly a chattel mortgage to secure a portion of your indebtedness?

A. This was the method we arrived at—some payment of cash—and to keep our business.

Q. And the mortgage was given as security for money previously advanced? A. Yes.

Q. Was there any objection to the giving of the mortgage?

A. We didn't want to do it—I say “we,” because we discussed it among ourselves. Mr. Gammill, Jr., and I discussed it. We knew that possibly a chattel mortgage might jeopardize our getting a loan from the Small Business Administration; it wasn't desirous but under the circumstances, with the advocacy of Sid Kelly, it was the only out.

Q. In other words, there was a discussion between you and Mr. [15] Gammill, Jr., as to the inadvisability of giving the mortgage at that time?

A. If you want to call it inadvisability, or lack of desirability, either one.

Q. But there was discussion as to the giving of the mortgage? A. Yes.

Q. And it was because of the reason you stated—the possible jeopardy of the refinance; you were the president of the company—— A. Yes.

Q. Let me ask the whole question——

A. All right.

(Testimony of Carl Morton.)

Q. I want to ask you what your financial condition was at the giving of this mortgage on December 3rd of 1956, referring to your insolvency by definition, the question of the excess of liabilities over assets, or assets over liabilities?

A. Well, as indicated in the appraisal—can I use these——

Mr. Aronson: Yes.

A. The appraisal and the financial statement indicated we had a good deal in excess of our liabilities; but also a very obvious fact to us was that we didn't have adequate capital to carry the——

Q. I am not asking you what was indicated; I am asking you what you knew of the business as of assets and liabilities in December, 1956?

A. Yes—I am talking about fixed assets, current assets—the whole kit and caboodle; I considered it solvent.

Q. You considered it solvent—you didn't consider it insolvent?

A. No—but for lack of working capital, a few minor operations [16] such as resawing, and preparing lumber for sale——

Q. It didn't increase your liabilities or decrease them?

A. In the month of December, yes, it did decrease our liabilities to this extent: We were utilizing an inventory that was an asset; we were selling inventory, a two-year depreciation inventory; at the same time we were paying out for wages and so forth, and we did not at that time have addi-

(Testimony of Carl Morton.)

tional logs coming in and additional lumber; it did double it.

Q. Did you operate at a profit or loss between January, 1956, and '57?

A. I don't know the exact figures, but my guess would be that we operated at a loss, because a mill has to operate at pretty full speed in order to make money.

Q. When you made money you paid bills with it?

A. Yes.

The Court: Mr. Morton, I want you to forget about working capital, and attempting to obtain a loan for small business or anyone else. In your opinion, in the event the assets of the bankrupt corporation were liquidated—ordinary liquidation—at the time this document was given to secure a creditor, in your opinion would the assets have been more or less than the obligations?

A. Substantially more.

Q. And that is the reason you say that in your opinion the bankrupt was solvent?

A. Yes, sir; as a side line, if I may say so—we were negotiating a short time later for a sale of the company at \$126,000.00 and were very close to a consummation of that particular sale. [17] This sale would have paid off all creditors except myself and my family, as far as their indebtedness was concerned.

Q. Now, you are familiar with the schedules filed?

A. Yes.

Q. And they were filed as of January 22, 1957.

(Testimony of Carl Morton.)

You are also familiar with the assets and liabilities? A. Yes.

Q. Did you have a belief that the condition was other than it was in December, or substantially the same in December? A. I would say yes.

Q. You believed it was better?

A. No; substantially the same.

Q. And this balance sheet marked for identification, are you familiar with that?

A. Balance sheet? This one was prepared January 31, 1957; I believe we prepared this ourselves from the books, didn't we?

Q. If you don't know, say so.

A. I don't know.

Q. (By Mr. Aronson): You didn't have that in December, 1956?

A. No; this was prepared during the sale.

Q. So all you have is the last balance sheet—July 31st of 1956 plus a knowledge of the operation of the business in the intervening period that you operated the business between you?

A. Yes.

Q. I show you a document. (The document is examined by the witness.)

Q. After looking at that document, do you still want to tell the Court that you believe it is solvent, and that its assets substantially exceed its [18] liabilities?

A. I took into account in that statement two amounts——

Mr. Rittenhouse: Here are three amounts.

(Testimony of Carl Morton.)

The Witness: Two amounts—the figures of notes payable to officers were not going to be urged.

Q. It was a debt, though?

A. It was.

Q. Still owing, isn't it, Mr. Morton?

A. Yes.

Q. It is being urged now, isn't it; you filed a claim in these proceedings, did you not?

A. Yes—of course, I did.

Q. It was then, and is now, a liability of the corporation and is reflected in the balance sheet and was made available to the Gammills; they knew it?

A. Yes, sir.

Q. As a matter of fact, you continued to operate as a deficit until July 31, 1956, the date of that balance sheet, did you not?

A. Well, this is one that shows a profit here. In the past we made a profit when we were able to operate.

Q. I am not sure you understood my question—

A. You said from July 31st did we make a profit; I can't answer that now. If I didn't have an accountant's record month by month my opinion is we were not making it.

Q. Your opinion is that you were working at a substantial deficit?

A. Do you mean based solely upon an income statement?

Q. No; solely upon the operation of business; you were losing money, weren't you? [19]

(Testimony of Carl Morton.)

A. Well, look, we had fixed debts upon the equipment; we are not disregarding those. If you operate from a profit-and-loss standpoint it wouldn't be a profit. Does that answer the question?

Q. Taking everything into consideration you couldn't pay your bills? A. That's right.

Q. Your bills were mounting up?

A. That's right.

Q. You owed—in a period of two months you incurred an indebtedness to the Gammills in excess of \$25,000.00, didn't you?

A. Some of those were being liquidated right along; you realize, of course, out of the inventory.

Q. I show you a balance sheet of July 31st; there is a deficit shown of sixty-six odd thousand dollars? A. Yes.

Q. I show you one of January 31st, 1957, to the date of—at the bottom—you have a deficit on November 1, 1956—what is that amount?

A. It reads \$132,053.52.

Q. Would that refresh your recollection as to the status of your business?

A. I would say yes.

Q. You knew, did you not, Mr. Morton, that your liabilities far exceeded the value of the assets, that they were substantially less than the amount of your liabilities, didn't you? I am referring to the first of December——

A. Are you taking into account the notes payable to officers?

(Testimony of Carl Morton.)

Q. Everything. A. Yes.

The Court: You already knew at that time that trying to obtain additional finances through the Small Business Administration or somebody else—you still couldn't continue to [20] operate; isn't that right? A. Quite right.

Q. And Mr. Gammill was a part of these negotiations? A. Yes.

Q. And he attended meetings with Small Business Administration people? A. Right.

Q. And he had the same knowledge that you had, didn't he? A. Yes.

Mr. Aronson: On this particular key point I have nothing further, your Honor. If I may proceed, there are a couple of other elements that are necessary to prove my case—I mean from Mr. Morton.

The Court: You mean now?

Mr. Aronson: May I make the suggestion that perhaps Mr. Rittenhouse and I can stipulate to these other matters—that there are other creditors who will receive substantially nothing from these proceedings——

Mr. Rittenhouse: I don't know anything about what the records show, so I would be unable to stipulate to that. (Discussion.)

Mr. Aronson: I think I can cover this proof without Mr. Morton or anybody else. As of December 1st, 1957, the Trustee had on hand \$17,115.16. Now there have been no substantial payments since then; it might be slightly less by small items. There

(Testimony of Carl Morton.)

are on file—in fact the claims are in the file and I have made a list and have run a tape, and the total is 75 claims filed as far as I know. Roughly, there are priority labor claims, \$1,799.18; expense of administration wage claims, \$1,296.46; tax claims, \$9,641.38; secured claims, \$22,148.62; [21] unsecured claims, \$320,275.93. Now this total doesn't include anything in the nature of the \$12,000.00 claim here being opposed. I haven't added the figures up but it is substantially more than the Trustee has on hand.

The Court: There are no further matters, to the knowledge of the Trustee in these proceedings, so this is the sole one to be disposed of. Possibly an adjustment may be necessary upon the sale, which would be charged against the estate because it is a shortage, not an overage; so, gentlemen, the unsecured creditors would receive virtually nothing in these proceedings. Do you want to carry this on the calendar? If not, I am going to excuse Mr. Morton.

Mr. Rittenhouse: I have some questions I want to ask him.

(Discussion concerning an agreeable date for continuance.)

The Court: Continued to February 21, at 2:00 p.m. [22]

[Title of District Court and Cause.]

FURTHER HEARING ON ORDER, ETC.

The Court: In the Matter of Los Gatos Lumber Products, Inc.

CARL MORTON

called as a witness on behalf of the Trustee, having been previously sworn by the Court, further testified as follows:

Direct Examination

By Mr. Aronson:

Q. Do you have the two balance sheets that you have referred to?

Mr. Rittenhouse: I think that this appraisal is in the picture; I think this July 31st balance sheet was the one.

Q. (By Mr. Aronson): Mr. Morton, at the last hearing reference was made to a balance sheet of the bankrupt corporation which was dated July 31, 1956, and if I remember correctly you testified that you and Messrs. Gammill relied in part upon this balance [23] sheet to determine the financial status of the corporation; is that correct?

A. I am not sure, but I believe we discussed it that way.

Q. Well, whether or not it was discussed—is that true? A. Yes.

Q. There have been numerous pencil notations made on this. Do you know who put this on there?

A. Yes; I did.

(Testimony of Carl Morton.)

Q. You did.

Mr. Aronson: We will offer this balance sheet in evidence, your Honor. (Addressing Mr. Rittenhouse.) Can it be pulled out?

Mr. Rittenhouse: You mean just the balance sheet? This was an audit prepared by the——

The Witness: American Audit Company; yes.

Q. (By Mr. Rittenhouse): This represents a copy of the original, Mr. Morton?

A. This would constitute an original, I guess.

Mr. Aronson: Well, put the whole document in.

The Court: Trustee's No. 1 of this date. (Audit by American Audit Co.)

Q. (By Mr. Aronson): You also made reference to another financial statement which was dated January 31, 1957.

Mr. Rittenhouse: Yes—this one here.

Mr. Aronson: As of January 31, 1957. You referred to that at the last hearing; is that correct?

A. Yes.

Mr. Aronson: We will offer that as our next Exhibit in order, your Honor.

The Court: Trustee's No. 2 of this date. (Financial Statement, [24] January 31, 1957).

Q. (By Mr. Aronson): Is it still your testimony, Mr. Morton, that the bankrupt corporation was solvent in the sense as we discussed last time—that is, the excess of assets over liabilities between the months of October and December, 1956?

A. Yes.

Q. It still is your testimony?

A. Yes.

(Testimony of Carl Morton.)

Q. In spite of the fact that you have in front of you the Exhibits—balance sheets, which show a substantial deficit? A. Yes.

Q. Will you explain to the Court how you reached the conclusion that they were obviously wrong?

A. You mean you want me to explain why the corporation was solvent?

Q. Yes.

A. Because as far back as of April, I believe, 1956, we realized we would need additional financing, and we had discussed and agreed that the notes of the two officers would be cancelled and taken in the form of equity stock.

Q. When you say "we," who do you mean?

A. My family—my wife, my former wife, and my mother and myself.

Q. Is that the total of the \$173,000.00 figure?

A. No.

Q. Who else is involved?

A. Hughston, my uncle, didn't agree to that at this time; he wanted the notes to stand up; the rest had agreed, and at a later date my uncle did agree.

Q. Just as to what did they agree?

A. They agreed to take equity stock in the company in lieu of [25] notes.

Q. That would still be a liability to the company, would it not?

A. That is, equity capital? Yes.

Q. They didn't waive anything, did they—or did they?

(Testimony of Carl Morton.)

A. There is a difference between the notes and liability; they waived the notes and took capital stock.

Q. They didn't waive the obligation, did they; did they ever tell either Mr. Gammill, Mr. Kelly, or Mr. Rittenhouse that they waived the money that was owed to them?

A. No; they didn't say it in those words; the only thing they agreed to was to take equity, capital stock in lieu of notes.

Q. They were going to take \$173,000 in stock?

A. Yes.

Q. That was in refinancing the corporation?

A. This would have been in refinancing the corporation, that is right.

Q. And the refinancing situation was to be handled through the Small Business Administration?

A. No; in August, for instance, I went to Colorado; we realized we needed additional financing——

Q. I don't want to cut you short, but in October, November, and December, you were working for a Small Business Administration loan?

A. Yes.

Q. And that was the refinancing you were concerned about? A. At that time.

Q. At that time, yes; and Mr. Gammill was completely familiar with that situation?

A. Yes. [26]

Q. And it is also true, is it not, Mr. Morton,

(Testimony of Carl Morton.)

it would have been impossible for you to continue the business if you did not get that?

A. If we did not get additional funds.

Q. And the Small Business Administration loan; you were operating on a deficit?

A. You are pinning it down—when you say additional funds.

Q. But at that time, October, 1956, the only source of additional funds available was the application to Small Business Administration?

A. Up to and at the time the funds became available from the Gammill organization.

Q. You mean money became available from Gammill?

A. In the form of advances.

Q. Yes. I am talking about that period; during that period is when you applied for a Small Business Administration loan? A. That is right.

Q. But you knew at that time you couldn't continue without a Small Business Administration loan or from some other source? A. Yes.

Q. You operated on a deficit?

A. For two months—not too much earlier.

The Court: Mr. Morton—so I will understand your answer—you previously testified that you and the others that you mentioned were willing to take equity capital?

A. In other words, common stock in lieu of notes.

Q. When you use the word “equity,” now am I to reach the conclusion that in the event there

(Testimony of Carl Morton.)

was no equity there would be [27] no obligation of Los Gatos Lumber Products, Inc., to pay off these obligations of you and these others that you mentioned?

A. I think, your Honor, you are going into something there——

Q. Tell me, in your own words, just what you and the others that you mentioned agreed to; you said that finally your uncle was the last one to agree, and that prior thereto you and the others had agreed to take equity stock—and I am trying to find out what you had in mind when you made that statement. If Los Gatos Lumber Products, Inc., was insolvent and went into bankruptcy, would there be any obligation on you people to pay anything?

A. If we had gone ahead and accomplished what we had agreed to then I presume we would just take the position of stock owners.

Q. And in the event you didn't obtain money on a Small Business Administration loan or from some other source, then what would your status be with reference to being a creditor, or having an obligation (due you) as a stock owner?

A. As a note holder, or stock holder ?

Q. Yes.

A. It would stay the same, I presume.

(Testimony of Carl Morton.)

Cross-Examination

By Mr. Rittenhouse:

Q. Now, Mr. Morton, I am going to show you a document dated January 7, 1955, and ask you whether or not you recognize this document?

A. I do.

Q. And ask you whether or not that is your signature on the second page of the document?

A. It is.

Q. Is that the signature of Mrs. Gammill, Jr., and one of Mr. [28] Parsons? A. Yes.

Q. When was this secured—on the date that it bears? A. The date that it bears.

Q. Was that secured by you?

A. Yes, my company's lawyer drew this up at the time we originally issued stock, the purpose being to give me a voting trust to control the stock—the stock that went to Edward Parsons.

Mr. Aronson: I will object to the testimony as being incompetent, irrelevant and immaterial.

Mr. Rittenhouse: I offer it in evidence; the purpose of the introduction, your Honor, is to show that this man, Mr. Morton, was at all times in control of the corporation. (Addressing the witness.) That document of trust was never revoked at any time?

A. No.

The Court: Respondent's No. 1.

Q. (By Mr. Rittenhouse): I show you a docu-

(Testimony of Carl Morton.)

ment dated April 23, 1956, which is signed "Paul," with reference to both sides. Do you recognize this document? A. Yes.

Q. Who is "Paul"?

A. He is my stepfather.

Q. With reference to the writing on the back side? A. That is my mother's.

Q. Did you receive that on or about the date it bears? A. Yes.

Mr. Rittenhouse: We offer this in evidence.

Mr. Aronson: To which we object; it is incompetent, irrelevant and immaterial; too remote in time.

Mr. Rittenhouse: The purpose of it is to show the intent of [29] his mother with reference to the \$10,000.00 she advanced, the very time she advanced it as being equity Capital for the issuance of stock.

The Court: I will mark it for indentification, Respondent's No. 2, and for the record, Mr. Morton, what is the last name of "Paul"?

A. Willer-vetersen.

Q. (By Mr. Rittenhouse): In September—maybe I should ask also with reference to the writing on this back page: What is your mother's last name? A. Ada Willer-vetersen.

Q. Maiden name?

A. Ada Whiteside Peterson.

Q. With reference to September, 1956; September and October of 1956: Did you have any reason to have your properties—that is not your properties,

(Testimony of Carl Morton.)

but the properties of the bankrupt corporation appraised? A. Yes.

Q. And do you have an opinion as to their value at that particular time?

A. What appraisal is that?

Q. Your opinion as to——

A. My opinion as to the validity of the appraisal?

Q. No—your opinion as to the value of the assets of the corporation? A. Yes.

Q. And would you express that opinion?

A. The physical assets of the corporation?

Q. Yes, physical assets.

A. Well, as shown in the recapitulation of the appraisal made by California Appraisal Company, I believe the figures arrived at there to be thorough and correct as of that time. [30]

Q. And what were the figures?

The Court: Do you have the appraisal, Mr. Rittenhouse?

Mr. Rittenhouse: I have a copy, and I believe the Trustee has one of the originals.

The Court: I wonder if Mr. Aronson would object, on the copy—I would sooner have the document before I hear Mr. Morton's interpretation of the document.

Mr. Rittenhouse: I will offer this in evidence.

Mr. Aronson: I will object to it as incompetent, irrelevant, and immaterial.

The Court: What is the date of the appraisal?

(Testimony of Carl Morton.)

A. The date on the covering letter is October 8, 1956.

The Court: And the date of the alleged preferential between? A. October 4th.

The Court: The Trustee alleges that the preference was created on December 3, 1956.

Mr. Rittenhouse: December 3, 1956, that is right.

Mr. Aronson: It was the date of the execution of the note and chattel mortgage.

Mr. Rittenhouse: That is correct; and this is in October.

The Court: Well, I will mark the appraisal at this time for identification and then I will listen to testimony as to whether or not the condition of the Los Gatos Lumber changed materially between October and December.

Q. (By Mr. Rittenhouse): Now, how was this particular appraisal made; do you recall?

A. Yes. [31]

Mr. Aronson: You mean the reason for it?

Mr. Rittenhouse: No—how.

Q. Did you observe how it was made?

A. Yes.

Mr. Aronson: May it be understood that I am objecting to the testimony with regard to the appraisal?

The Court: That is right.

The Witness: Do you want me to answer?

The Court: You may proceed.

Mr. Rittenhouse: Yes—How was it made?

(Testimony of Carl Morton.)

A. Mr. C. N. Uznay, who is an appraiser for the California Appraisal Company, came to our mill at our request. I authorized him to make an appraisal and he proceeded to do it, and stayed there, if my memory is correct, two or three full days and proceeded to inventory and check each piece of equipment of the physical assets of the mill—that was buildings and equipment.

Q. Now, with reference to the summary over here: Will you read that into the record; in other words, what is the summary or recapitulation of this appraisal?

A. Yes. Including all physical assets of the mill—the new replacement values, \$199,350.35; sound value, \$173,506.11; insurable value, \$160,900.25.

Q. Now, between the time that this appraisal was made and the date of the third day of December, 1956, were there any deletions or additions to the particular articles at the mill?

A. You mean physical assets? [32]

Q. Yes.

A. None to my knowledge, of any consequence.

Mr. Rittenhouse: Now with that, your Honor, I will offer this in evidence.

Mr. Aronson: Same objection—incompetent, irrelevant, and immaterial; self-serving for the purpose which I think is already established.

The Court: The testimony is that this appraisal was made by the California Appraisal Company; there is no objection with reference to this being a copy?

(Testimony of Carl Morton.)

Mr. Aronson: No. No objection to the fact that it is a copy.

The Court: And Mr. Morton has stated that in his opinion there were no substantial changes.

Mr. Morton: No.

The Court: The objection is overruled, and the document becomes Respondent's No. 3 in evidence.

Q. (By Mr. Rittenhouse): Now, with reference to the inventory value as recited in Trustee's Exhibit No. 1, which is dated July 31, 1956, will you read into the record the total of the current assets?

A. Yes. As indicated by the balance sheet dated July 31, 1956——

Q. Just the total.

A. The current asset figure is \$57,510.52.

Q. Now, with reference to Trustee's Exhibit No. 2, the current asset value is what on this, as of January 31, 1957?

A. The current asset value is \$13,253.37.

Q. Now, do you have any opinion as to what the value of the [33] assets as of December 3, 1956, would have been?

Mr. Aronson: I will object to that as calling for the opinion and conclusion of the witness. He might say "No."

Mr. Rittenhouse: I suggest you give him a chance——

The Witness: I would have to answer this way: We were in the process at that time of selling inventory——

(Testimony of Carl Morton.)

Mr. Aronson: I think that calls for a "yes" or "no" answer.

Mr. Rittenhouse: Do you have an opinion?

A. Yes.

Q. What is that opinion?

Mr. Aronson: I will make the objection that it is calling for his opinion.

The Court: Sustained.

Mr. Rittenhouse: I will call your attention to the pencil notations that are on this balance sheet dated 7-31-56, and your statement was, on direct examination, that they were your pencil notations; is that correct? A. Yes.

Q. Now when were they placed on this balance sheet? A. In August of 1956.

Q. And with reference to the words "into stock"; what does that mean?

A. At that time I was back in Colorado, talking to people and trying to get a loan for Los Gatos Lumber—I don't know the names of the individuals I talked to—and I was working with the balance sheet at that time to show that when stock was taken in lieu of notes payable to officers that the firm's balance sheet assumed a much better light and picture; if the [34] notes payable to officers were turned over into stock, were replaced with stock, that the firm would be in much better shape then, and I was talking to two men who might loan money to the corporation—we had agreed to do this—and the pencil notations were

(Testimony of Carl Morton.)

merely my working on that basis as to what would turn out.

Mr. Aronson: I move to strike all the last part of the testimony concerning the conversations and the reason for the pencil notations as being incompetent, irrelevant, and immaterial.

Mr. Rittenhouse: It shows the intention at the time these instruments were used and marked.

The Court: I think both you gentlemen and the Court will agree that the crux of this matter is that the money due these people was the difference between solvency and insolvency at the time of payment; that is the whole case as the Court sees it.

Q. (By Mr. Rittenhouse): Now, with reference to Mr. Gammill's advances: Was he aware of this understanding that you had with your family, that the notes would be turned into capital——

A. Into stock?

Q. Or into capital stock?

Q. (By Mr. Aronson): Upon a refinancing?

Mr. Rittenhouse: Upon a refinancing, yes.

Q. At that time, when Mr. Gammill advanced this money——

A. When he advanced it, yes.

Q. ——he was aware of this?

A. Yes, he was aware of it.

Q. And how many times did you discuss it with him? [35]

A. I don't remember the number of times.

Q. Was it more than once?

A. Yes, it was discussed some time back, and it

(Testimony of Carl Morton.)

was discussed with my former wife and myself in the spring. She was a note holder at the time.

The Court: We are concerned about the discussion with Gammill.

A. He was there at times; it was discussed prior to that time with George Stepovich.

The Court: All these times that Mr. Gammill was present?

A. I am talking of the times when he was present, and it was discussed with him. Of course that was when we were trying to get the Small Business Administration loan, and in the course of the statements and so forth it was discussed a number of times during the period of time, April on through until the refusal of the Small Business Administration loan.

Q. Well, now with reference to the particular advances of Mr. Gammill, when they were made the understanding that you had with your family was that your claims were to be subordinate to his particular advances; is that not correct?

A. Yes.

Q. And that understanding remained all during the time that he advanced it, during the time that this chattel mortgage was given; is that correct?

A. That is right.

Mr. Rittenhouse: For the purpose of the record, this Small Business Administration office is in San Francisco. I have secured certain photostats of certain portions of the record of the application, the original of which is in Washington.

(Testimony of Carl Morton.)

Q. Mr. Morton, I showed you these documents, or these [36] photostats? A. Yes.

Q. And you have examined them?

A. Yes.

Q. And what do they appear to be?

A. A copy of the original application.

Q. Of certain portions of it?

A. Certain portions of the application for a Small Business Administration loan.

Q. With particular reference to what was to be done with these applications to the members of your family? A. Yes.

Q. And these represented a true copy of the original that was filed with the Small Business Administration? A. Yes.

Q. Were the originals of these all signed by the parties involved? A. Yes.

Mr. Rittenhouse: I will offer this in evidence.

Mr. Aronson: I will object to that as incompetent, irrelevant, and immaterial.

The Court: Objection overruled. Respondent's No. 4 in evidence.

Q. Now, with reference to the letter from your mother and stepfather, marked Respondent's 2, for identification, was this authorization ever withdrawn or ever changed? A. No.

Q. As I understand—I will now offer this in evidence, your Honor.

Mr. Aronson: Same objection, your Honor. No. 2 in evidence.

(Testimony of Carl Morton.)

The Court: Overruled. Respondent's No. 2 for identification.

Q. Now, Mr. Morton, at the time of the alleged preference [37] given in December, your attorney at that time was whom?

A. George Stepovich.

Q. As a matter of fact, he still is your attorney?

A. Yes.

Q. Do you know who was representing Mr. Gammill?

A. At that time?

Q. Yes. A. Bob Bennett—Mr. Bennett.

Q. Do you know who was representing Mr. Kelly at that time?

A. Mr. Rittenhouse—you.

Q. What was your understanding with reference to the demands of Mr. Rittenhouse? Were you going along with those, or what?

A. No. I objected to your demands. I objected to the demands of Mr. Rittenhouse at the time.

Q. (By Mr. Aronson): What objections?

A. For the chattel mortgage.

Q. What was the basis of your objection?

A. I didn't at that time want to encumber the Los Gatos Lumber Products with any additional indebtedness of the nature of a chattel mortgage when we were trying to get a loan from the Small Business Administration.

Q. How was this objection overcome?

A. By argument.

Q. That is a good answer. I show you a docu-

(Testimony of Carl Morton.)

ment dated March 15, 1957, and ask you whether or not you recognize the signatures here?

A. You just want me to identify the signatures now?

Q. Yes.

The Court: March of 1957?

Mr. Rittenhouse: Yes. This even shows the values at that time.

The Court: After the filing? [38]

Mr. Rittenhouse: Yes. The sole purpose of this is to show the fair value of the assets even after the filing of the petition; other than that I think it is incompetent, irrelevant, and immaterial.

Mr. Aronson: I agree with you. That document never came into being?

Mr. Rittenhouse: It is in being—here it is.

Redirect Examination

By Mr. Aronson:

Q. To clarify my mind, to make sure I understand it correctly, Mr. Morton, the question of the changing of the status of you and your family as far as the notes were concerned, or to change it to stock, was conditional upon the financing—obtaining of the financing? A. Right.

Q. As a matter of fact, if I remember your letter of the 10th—which is attached to Exhibit No. 4, says—the portion of the application of the Small Business Administration—that is exactly

(Testimony of Carl Morton.)

what it says—puts as a condition, “that said Los Gatos Lumber Products, Inc., obtains from Small Business Administration \$150,000.00 within 90 days from date hereof within the lifetime of Carl Morton.” That application had been made prior to the time these advances were made in October, November and December; is that right?

Mr. Rittenhouse: Portions, I believe, of the advances were made after December the third, and portions prior to December 3rd.

A. Yes. [39]

Q. Your letter of intent bears the jurat “Sworn and subscribed to before me this 10th day of September, 1956? A. Yes.

Q. And Mr. Gammill was fully aware of this application? A. Yes.

Mr. Aronson: I have nothing further.

Mr. Rittenhouse: Would you like to call Mr. Gammill, or should I?

PAUL GAMMILL, JR.

The Court: Mr. Paul Gammill has been previously sworn.

Cross-Examination

By Mr. Rittenhouse:

Q. You made an inquiry—I show you Trustee’s Exhibit No. 1 in this matter and ask you whether or not you have ever seen this before?

A. Yes, sir.

(Testimony of Paul Gammill, Jr.)

Q. Did you see it on or about the time it was made? A. Yes, sir.

Q. And did you at any time have conversations with Mr. Morton relative to this particular balance sheet and this statement? A. Yes.

Q. Where did they take place?

A. Well, this particular one took place at Mr. Morton's house. Mr. and Mrs. Morton and myself were discussing the idea or refinancing the loan.

Q. With reference to these particular items marked Notes Payable to Officers: What was the understanding or agreement relative to your advances and those particular parts of interest on the balance sheet? [40]

A. Well, my understanding was—we had an agreement with Mr. Morton relative to the fact that the notes were to be capital stock—they were to be replaced by stock.

Q. And was that at all times dependent upon the fact that it would be refinanced, or solely on the basis of your advances?

A. Well, that was on the basis of any advances; it was discussed with a number of people.

Q. What other people did you discuss it with?

A. You mean the people we discussed the transactions——

Q. Yes.

A. ——or people we discussed the finances with?

Q. No. When you were paying money into this company, who did you discuss it with?

(Testimony of Paul Gammill, Jr.)

A. We discussed it with Mrs. Kelly, Mrs. Sibly, Mr. Bennett; we discussed it with my father—it was just pretty near common knowledge—I mean——

Q. We are particularly interested in the discussions and your understanding at the time that you made these advances; in the discussions I want the members, if possible, who were present.

A. Well, we first discussed this way prior to my advances. In other words, Gammill's advances, and then there were discussions with Mr. George Stepovich.

Q. At this time was Mr. Morton present?

A. Yes. It was discussed about the refinancing at the time, and Mr. Stepovich brought up about the balance sheet himself. He was very upset at the assets and liabilities, and said, "We will have to do something here about the notes," and I [41] believe it was suggested by Mr. Stepovich and it was agreed by Mr. Morton that those notes would be cancelled and made into stock.

Q. Was that the date on which you advanced these funds and also the materials necessary for the operation of this mill?

A. Well, yes—without that I don't think anybody could operate.

Mr. Aronson: I ask the last part be stricken.

The Court: The last part will go out. That was the basis of your putting up of advances, for furnishing material.

A. Yes, I even discussed that with my family back home over the telephone. They wanted to

(Testimony of Paul Gammill, Jr.)

know the condition of the company, and I had mailed them a balance sheet and we discussed the balance sheet, and, of course, the first question they asked was about the notes, and that was discussed with Mrs. Kelly.

Q. Was that after it was changed?

A. No.

Q. First about the advances? A. No.

Q. And during this period of time why the chattel mortgage was executed and delivered; is that correct? A. Correct, sir.

Mr. Rittenhouse: I think I have no other questions.

Redirect Examination

By Mr. Aronson:

Q. You worked on the Small Business Administration with Mr. Morton, didn't you?

A. Yes, sir.

Q. And were fully aware of the contents of the application? A. Yes, I am—I mean——

Q. You were at the time it was presented, weren't you, Mr. [42] Gammill, you were familiar with the transaction?

A. I was familiar with the transaction, yes. I don't remember the content.

Q. But you had seen it at the time?

A. Right, sir.

Mr. Aronson: I think that is all.

Mr. Rittenhouse: The law requires four or five

different elements to establish what makes a preference.

The Court: Well, to avoid any misunderstanding we will submit it—20 and 15. The Trustee, to file the Opening Memo, will have 20 days, and the Respondent will have 15 days to reply, and the attorney for the Trustee to notify the Court as to whether or not he desires to file a Closing Memo, within 10 days; 20-15 and 10. Let the record show the Court has retained the six Exhibits.

[Endorsed]: Filed November 26, 1958, Referee.

[Endorsed]: Filed December 12, 1958, U.S.D.C.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and Exhibits are the originals filed in this Court and that they constitute the record on appeal as designated by the Attorneys for the appellant:

Petition by Creditors.

Statement of Affairs and Schedules.

Order of Reference.

Order of Adjudication.

Order to Show Cause.

Trustee's Objection to the Proof of Secured Claim of Emmet L. Rittenhouse.

Findings of Fact and Conclusions of Law.

Order Allowing Secured Claim.

Referee's Certificate on Petition of Findings of Fact and Conclusions of Law and Order Allowing Secured Claim.

Notice of Hearing.

Order Affirming Referee.

Notice of Appeal.

Designation of Contents Record.

Transcript of Hearing on Order to Show Cause.

Trustee's Exhibits 1 and 2.

Respondents Exhibits 1, 2, 3 and 4.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 13th day of January, 1959.

[Seal]

C. W. CALBREATH,
Clerk;

/s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 16330. United States Court of Appeals for the Ninth Circuit. Charles E. Hoppe, Trustee of the Estate of Los Gatos Lumber Products, Inc., Bankrupt, Appellant, vs. Emmet L. Rittenhouse, Appellee. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: January 13, 1959.

Docketed: January 22, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16330

CHARLES E. HOPPE, Trustee of the Estate of
Los Gatos Lumber Products, Inc., a California
Corporation, Bankrupt,

Appellant,

vs.

EMMET L. RITTENHOUSE,

Appellee.

APPELLANT'S CONCISE STATEMENT OF
POINTS URGED ON APPEAL

Comes now Charles E. Hoppe, Trustee, Appellant herein, and in accordance with Rule 17(6) of the Rules and Practice of the United States Court of Appeals for the Ninth Circuit, specifies the following as a concise statement of the points on which he intends to rely on this appeal from the Order made and entered by Honorable Oliver J. Carter, Judge of the United States District Court for the Northern District of California, on the 19th day of December, 1958, more particularly specified and described in the Notice of Appeal heretofore filed with the Clerk of said District Court on the 31st day of December, 1958, as follows:

1. That said Order was not supported by the evidence and is contrary to the law in that:

(a) The District Court in said Order erred in finding that the Findings of the Referee in Bankruptcy were not "clearly erroneous."

(b) The District Court in said Order erred in holding that the Findings of Fact 4, 5, 6 and 7, and each of them, were supported by the evidence adduced upon the trial of the issues.

(c) The District Court in said Order erred in sustaining the Order of the Referee in Bankruptcy that the chattel mortgage, which is the subject of controversy herein, was not a preferential transfer within the meaning of Section 60 of the Bankruptcy Act.

Dated this 22nd day of January, 1959.

SHAPRO & ROTHCHILD,

By /s/ DANIEL ARONSON, JR.,
Attorneys for Charles E. Hoppe, Trustee of the
Estate of Los Gatos Lumber Products, Inc., a
California Corporation, Bankrupt.

[Endorsed]: Filed January 20, 1959.

No. 16,330

United States Court of Appeals
For the Ninth Circuit

CHARLES E. HOPPE, Trustee of the Estate of Los Gatos Lumber Products, Inc., a California corporation, Bankrupt,

Appellant,

vs.

EMMET L. RITTENHOUSE,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

JUL - 1959

PAUL P. O'NEILL, CLERK

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No. 16,330

United States Court of Appeals For the Ninth Circuit

CHARLES E. HOPPE, Trustee of the Estate of Los Gatos Lumber Products, Inc., a California corporation, Bankrupt,

Appellant,

vs.

EMMET L. RITTENHOUSE,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The Referee in Bankruptcy on August 4, 1958, made and entered his Findings of Fact and Conclusions of Law (T.R. p. 13) and Order Allowing Secured Claim (T.R. p. 18), which order was made in proceedings pending in the United States District Court for the Northern District of California, entitled "In the Matter of Los Gatos Lumber Products, Inc., a California corporation," Bankrupt, being No. 47996 in the records and files of said Court.

Appellant's Petition to have the Order reviewed by the District Court was filed on August 29, 1958. (T.R.

p.....). The Petition was timely (11 U.S.C.A. Sec. 67(c)). The District Court had jurisdiction to review the Order (11 U.S.C.A. Section 67(c)). In an Order made on December 19, 1958, the District Court affirmed the Order of the Referee. (T.R. p. 29.) Notice of Appeal therefrom to this Court was filed December 31, 1958. (T.R. p. 29.) The Appeal was timely. (11 U.S.C.A., 48.) The jurisdiction of this Court to review the order of the District Court is sustained by 11 U.S.C.A. 47.

STATEMENT OF QUESTION PRESENTED.

The question before the Court is as to whether the chattel mortgage, which is the basis for Appellee's secured claim, was preferential within the meaning of Sections 60 a and b of the Bankruptcy Act. (11 U.S.C.A., Sections 96 a and b.)

SPECIFICATION OF ERROR.

The Appellant's concise statement of points urged on appeal filed herein (T.R. p. 80) gives in detail the points relied upon by Appellant. They are as follows:

1. That said Order was not supported by the evidence and is contrary to law in that:

(a) The District Court in said Order erred in finding that the Findings of the Referee in Bankruptcy were not "clearly erroneous."

(b) The District Court in said Order erred in holding that the Findings of Fact 4, 5, 6 and 7, and each of

them, were supported by the evidence adduced upon the trial of the issues.

(c) The District Court in said Order erred in sustaining the Order of the Referee in Bankruptcy that the chattel mortgage, which is the subject of controversy herein, was not a preferential transfer within the meaning of Section 60 of the Bankruptcy Act.

STATEMENT OF FACTS.

On January 22, 1957, an involuntary petition in bankruptcy was filed against Los Gatos Lumber Products, Inc., a California corporation, in the Southern Division of the United States District Court for the Northern District of California (T.R. p. 3), and on March 29, 1957, it was duly adjudged bankrupt by said Court (T.R. p. 8). On January 8, 1958, Charles E. Hoppe, Appellant herein, the duly elected, qualified and acting Trustee of the estate of said bankrupt, filed with the said District Court, his objections to the proof of secured claim of Emmet L. Rittenhouse (T.R. p. 10), and on the same date the Referee in Bankruptcy made and entered an Order to Show Cause thereon (T.R. p. 9). Thereafter, after hearings held on said objection and Order to Show Cause on January 31, 1958, and February 21, 1958, the Referee made and entered on August 4, 1958, his Findings of Fact and Conclusions of Law (T.R. p. 13), and his Order Allowing Secured Claim (T.R. p. 18) and thereafter appellant timely filed with the Referee his Petition for Review of said Order (T.R.

p.....) and thereafter hearing was held on said Petition for Review before Honorable Oliver J. Carter, Judge of said United States District Court, and thereafter and on December 19, 1958, Judge Carter made and entered his Order (T.R. p. 29) here appealed from. Said notice of appeal having been filed with said District Court on December 31, 1958 (T.R. p. 29).

Between October 4, 1956, and December 3, 1956, the date promissory note and mortgage of chattels hereinafter referred to bear, Appellee's assignors, Gammill & Company, advanced moneys and/or credit to Los Gatos Lumber Products, Inc., a California corporation, hereinafter referred to as the Corporation, in a sum in excess of \$25,000.00 for the purpose of assisting it to stay in business (T.R. p. 34), one of the sources of such funds being from Cyril S. Kelly, Jr. and Marjorie G. Kelly, who desired to be paid by Gammill & Company the sums due them from Gammill & Company (T.R. p. 36).

On December 3, 1956, the Corporation signed a promissory note and chattel mortgage, together with a Notice of Intended Mortgage of Chattels, which Notice recited that said Corporation intended to mortgage to Gammill & Company certain machinery and equipment and other personal property, and that the consideration therefor would be given on December 14, 1956; that after said 14th day of December, 1956, said note and chattel mortgage, together with an assignment of same were delivered to Appellee. Said chattel mortgage was duly recorded on December 19, 1956.

That at all times the Corporation was in need of additional working capital to carry on its business operations. Appellee's assignors knew of the need of the Corporation for additional working capital (T.R. p. 40) and assisted the Corporation in various efforts to obtain financing and were familiar with the value of the assets and equipment of the Corporation.

ARGUMENT.

I. THE GIVING OF THE CHATTEL MORTGAGE WAS A PREFERENCE.

The elements of a preferential transfer are set forth in Sections 60 a and b of the Bankruptcy Act, and are as follows:

- (1) Transfer by debtor of his property
- (2) Creditors only may be preferred
- (3) For or on account of an antecedent debt
- (4) When the debtor is insolvent
- (5) Within four months of the filing of the petition in bankruptcy
- (6) To enable a creditor to obtain a greater percentage of his debt than some other creditor of the same class
- (7) That the creditor had reasonable cause to believe that the debtor was insolvent.

That a chattel mortgage is a transfer within the meaning of Section 60a of the Bankruptcy Act is quite clear, 3 *Collier on Bankruptcy*, 14th Ed., Section

60.13, Page 800 and cases therein cited. That the Appellee's assignor Gammill was a creditor and that the chattel mortgage was given on account of an antecedent indebtedness and within four months of bankruptcy, is not contested and we will therefore not expand on those elements at this time. That the allowance of the chattel mortgage did enable this creditor to obtain a greater percentage of his debt than other creditors of the same class is clearly shown by the offer of proof made by counsel for the Appellant Trustee and accepted by Appellee in that the Trustee had on hand the sum of \$17,155.16. That he has paid or will be required to pay expenses of administration labor claims in the sum of \$1,296.46, priority labor claims in the sum of \$1,799.18, and priority tax claims in the sum of \$9,641.38, or an aggregate total of \$12,737.02, leaving a balance of less than \$5,000.00 to pay the expenses of administration, and a dividend to unsecured creditors in excess of \$300,000.00 (T.R. pp. 53-54).

The other two elements, to-wit, the insolvency of the debtor and reasonable cause on behalf of the claimant to believe that the debtor was insolvent, will now be discussed and treated together because of the close relationship between Appellee's assignor Gammill and the bankrupt. It was the testimony of both Gammill (T.R. p. 40) and Morton (T.R. p. 53) that the bankrupt was under capitalized, and that it was necessary for the bankrupt to obtain additional capital in order for it to continue in business, and Gammill well knew of the attempts of the bankrupt to obtain the addi-

tional financing, and, in fact, Gammill assisted in the preparation of the papers for the application to the Small Business Administration for the loan (T.R. p. 53).

It was further the testimony of both Morton and Gammill that they relied on the financial statement of the bankrupt dated July 31, 1956 (Trustee's Exhibit No. 1—T.R. p. 56), and which statement showed a deficit of \$66,695.45 and the financial statement dated January 31, 1957 (Trustee's Exhibit No. 2—T.R. p. 56), which showed that as of November 1, 1956, the bankrupt had a deficit of \$111,000.00.

Notwithstanding their own testimony and the evidence above referred to, both Morton and Gammill testified that the bankrupt was not insolvent on December 3, 1956, although they both testified that the business would fail without the obtaining of the additional financing (T.R. p. 59). The reason given by Morton and Gammill for their statement that the bankrupt was not insolvent is that they disregarded as a liability the notes due to stockholders which total \$173,813.12 by reason of the fact that these note holders agreed to take "equity" stock of an equal amount to the notes which they held (T.R. pp. 57-58). It was Morton's testimony that this surrender of the notes for the stock was conditioned upon obtaining the financing (T.R. p. 60 and T.R. p. 71) and such condition is clearly set forth in the notes of intent, which is part of the application to the Small Business Administration (Claimant's Exhibit No. 4—T.R. p. 70). Gammill testified that he was familiar

with the application at the time of its presentation (T.R. p. 76). In any event, the notes were never surrendered for stock, nor was the additional financing obtained from the Small Business Administration, nor from any other source, and Morton filed a claim in the bankruptcy proceedings (T.R. p. 51). Further, it is submitted that if this procedure had been followed, the financial statement would not have been changed at all, except that the corporation's indebtedness would be to the stockholders, rather than to the note holders.

The test to be applied to determine whether or not a creditor had reasonable cause to believe that the debtor was insolvent is not "actual knowledge" of insolvency, but is "reasonable cause to believe." See 3 *Collier on Bankruptcy*, 14th Ed., Section 60.53, page 989:

"Knowledge of insolvency is not necessary, nor even actual belief thereof; all that is required is a reasonable cause to believe that the debtor was insolvent at the time of the preferential transfer. *A creditor has reasonable cause to believe that a debtor is insolvent when such a state of facts is brought to the creditor's notice respecting the affairs and pecuniary condition of a debtor, as would lead a prudent business person to the conclusion that the debtor is insolvent.*" (Emphasis ours.)

Thus, if the facts are sufficient to put a prudent business person on notice, he is chargeable with notice of all the facts which reasonably diligent inquiry would have disclosed.

Here, Appellee's assignor had *actual* knowledge by reason of his access to the books of the corporation, as well as to his connection with the operation of the business.

II. DISTRICT COURT'S HOLDING THAT REFEREE'S FINDINGS WERE NOT "CLEARLY ERRONEOUS".

The District Judge, in his Order here appealed from (T.R. p. 29), held only that Appellant Trustee's Petition for Review raised questions of fact which were decided by the Referee on conflicting evidence, and affirmed the Referee's Order since he found that said findings were not "clearly erroneous." In this connection we would call the Court's attention to *Costello vs. Fazio*, 256 Fed. 2d 903, wherein this Court, in discussing the general rule of law that the District Court, and this Court on appeal, are required to accept the findings of a Referee in Bankruptcy unless findings are clearly erroneous, and where, at page 908, the Court stated:

"Where a finding of fact by the referee is based upon conflicting evidence, or where the credibility of witnesses is a factor, a district court and, on appeal, a court of appeals, will seldom hold such a finding clearly erroneous. *The same reluctance is not encountered with regard to a factual conclusion from given facts.* In the latter case, the proper conclusion from given facts can be made by the trial judge, or the court of appeals, as well as the referee." (Emphasis ours.)

Here, the evidence, in our opinion, was not even conflicting, in that both Morton and Gammill testi-

fied that the money owed to the Morton family was to be treated as "equity stock" and that therefore the corporation was solvent. However, the actual fact admitted by both Gammill and Morton in that they were familiar with the contents of the application to the Small Business Administration, was that the Morton family indebtedness was actually an indebtedness of the bankrupt, and that it was the Morton family intent to convert the same to common stock in the bankrupt predicated upon (1) all other Morton family creditors of the bankrupt similarly converting their notes into stock, and (2) upon the bankrupt obtaining from the Small Business Administration a loan of \$150,000.00 to \$175,000.00 within ninety days from September, 1956 (Claimant's Exhibit No. 4, T.R. p. 70). That the Small Business Administration Loan was not, on the date of the giving of the mortgage by the bankrupt to Gammill, or at any other time, obtained, and that the Morton family did not convert their notes to stock, was conceded by both Morton and Gammill, and is further substantiated by the filing by Morton, Mrs. Morton and Morton's mother of proofs of claim in the bankruptcy proceedings based upon the notes.

The Referee (T.R. p. 68) correctly stated the question:

"I think both you gentlemen and the Court will agree that the crux of this matter is that the money due these people was the difference between solvency and insolvency at the time of payment, that is the whole case as the Court sees it."

but reached a clearly erroneous factual conclusion from given facts.

In view of the facts and law hereinabove set forth, it is Appellant's contention that the chattel mortgage given by said bankrupt to said Appellee's assignor was and is a preference voidable under the provisions of Sections 60 a and b of the Bankruptcy Act, and that the Order here complained of should be, by this Court, reversed, and remanded with instructions to the Referee in Bankruptcy to make and enter an order in said bankruptcy proceedings that said proof of claim of said Emmet L. Rittenhouse be allowed only as a general, unsecured claim.

Dated, Burlingame, California,

June 29, 1959.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By ARTHUR P. SHAPRO,

Attorneys for Appellant.

DANIEL ARONSON, JR.,

Of Counsel.

(Appendix A Follows.)



Appendix.

Appendix A

TABLE OF EXHIBITS

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TRUSTEE'S EXHIBITS

1. Financial Statement dated July 31, 1956... Transcript p. 56
2. Financial Statement dated January 31, 1957 Transcript p. 56

CLAIMANT'S EXHIBITS

1. Voting Trust Agreement dated January 7,
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2. Letter dated April 23, 1956..... Transcript p. 71
3. Appraisal dated October 8, 1956..... Transcript p. 56
4. Portions of Small Business Administration
Loan Application Transcript p. 70

No. 16,330

United States Court of Appeals
For the Ninth Circuit

CHARLES E. HOPPE, Trustee of the Estate of Los Gatos Lumber Products, Inc., a California corporation, Bankrupt,

Appellant,

VS.

EMMET L. RITTENHOUSE,

Appellee.

APPELLANT'S CLOSING BRIEF.

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United States Court of Appeals

For the Ninth Circuit

CHARLES E. HOPPE, Trustee of the Estate of Los Gatos Lumber Products, Inc., a California corporation, Bankrupt,

Appellant,

vs.

EMMET L. RITTENHOUSE,

Appellee.

APPELLANT'S CLOSING BRIEF.

SUMMARY OF APPELLANT'S POSITION.

Appellant's position is completely set forth in his opening brief, and will be more fully referred to hereafter in connection with his reply to specific points advanced by Appellee. The major premise of Appellant's position is basically that the chattel mortgage which is the basis for Appellee's secured claim, is preferential within the meaning of Sections 60 a and b of the Bankruptcy Act (11 U.S.C.A., Sec. 96 a and b) in that Appellee's assignor not only had reasonable cause to believe that the bankrupt was insolvent at the time of the execution of the chattel mortgage, but that he actually knew that the bankrupt was then and there insolvent.

ARGUMENT.

Appellee's assignor testified that he believed that the bankrupt's assets exceeded its liabilities at the time of the execution of the chattel mortgage (T.R. pp. 38-39) notwithstanding the facts that (1) he was fully aware of the fact that the bankrupt's statement of July 31, 1956 (Trustee's Exhibit No. 1, T.R. p. 56), clearly showed a deficit of some \$66,000.00 in assets as compared with liabilities; (2) that Appellee's assignor had advanced money to the bankrupt to assist it to stay in business until it was refinanced (T.R. p. 34); (3) that it could not remain in business without the refinancing (T.R. p. 40); and (4) that he was attempting to collect the bankrupt's accounts receivable. (T.R. p. 40.)

We further call to the Court's attention that at the time the execution of the chattel mortgage was discussed, the bankrupt pointed out that such a mortgage might jeopardize the obtaining of the loan from the Small Business Administration (T.R. pp. 47, 71), and that the obtaining of the financing was necessary for the bankrupt to continue in business. (T.R. pp. 40, 53.) Appellee, in his brief on pages 3, 4, 6 and 7, sets forth his basic position which is that the bankrupt was not insolvent at the time of the execution of the chattel mortgage, basing this assumption upon the alleged fact that the notes payable of \$173,813.12 representing the indebtedness of the bankrupt to the Morton family was to be treated as "equity stock" rather than a liability of the bankrupt. This is based upon the fact, as testified to, that the Morton family

would surrender their notes and take equity stock in lieu thereof, and that this was discussed with Appellee's assignor. (T.R. pp. 68-69, 74-75.) While such assurances probably were made by Morton, we submit that same were subject to specific conditions precedent before the notes would or could be treated as stock. We will concede, for purposes of argument only, that insofar as Morton's mother is concerned, perhaps her contribution was intended to be capital evidenced by stock and not as a loan (Claimant's Exhibit No. 2, T.R. pp. 61-62, 70-71), but this involves only \$10,000.00 and does not change Appellant's position or the fact that the balance of \$163,000.00 was, prior to the execution of the chattel mortgage, at the time thereof, and at all times thereafter, considered as and constitutes a liability of the corporation, because of failure to meet the conditions precedent to these notes being changed to stock.

Reference is made by Appellee in his brief at pages 4 and 7 to the fact that Morton made similar assurances to other potential investors (T.R. pp. 67-68) and that such a notation was placed upon the balance sheet. (Trustee's Exhibit No. 1, T.R. pp. 67-68.) The testimony of Mr. Morton (T.R. p. 67) shows that these "prior assurances" and the pencil notation on the balance sheet were made in August of 1956 prior to the creation of the situation leading up to the chattel mortgage and which conversations and dealings were not made in the presence of Appellee's assignor, and that, even at that remote date, it was Morton's inten-

tion to convert the notes to stock *only when the financing was obtained.*

Testimony of Carl Morton:

“At that time I was back in Colorado, talking to people and trying to get a loan for Los Gatos Lumber—I don’t know the names of the individuals I talked to—and I was working with the balance sheet at that time to show that *when* stock was taken in lieu of notes payable to officers that the firm’s balance sheet assumed a much better light and picture; *if the notes payable to officers were turned over into stock*, were replaced with stock, that the firm would be in much better shape then, and I was talking to two men who might loan money to the corporation—we had agreed to do this—and *the pencil notations were merely my working on that basis as to what would turn out.*” (Italics ours.) (T.R. pp. 67-68.)

The actual fact, we believe, is clearly shown to be that the notes payable by the bankrupt to the Morton family were to be treated as equity stock *when and only when* the conditions precedent were met, to-wit, when the additional financing was obtained by the corporation or when the corporation was sold by Morton. Morton testified to this:

“A. If we had gone ahead and accomplished what we had agreed to then I presume we would just take the position of stock owners.

Q. And in the event you didn’t obtain money on a Small Business Administration loan or from some other source, then what would your status be with reference to being a creditor, or having an obligation (due you), as a stock owner?

A. As a note holder, or stock holder?

Q. Yes.

A. It would stay the same I presume.” (T.R. p. 60.)

* * *

“Q. To clarify my mind, to make sure I understand it correctly, Mr. Morton, *the question of the changing of the status of you and your family as far as the notes were concerned, or to change it to stock, was conditional upon the financing—obtaining of the financing?*

A. *Right.*

Q. As a matter of fact, if I remember your letter of the 10th—which is attached to Exhibit No. 4, says—the portion of the application of the Small Business Administration—that is exactly what it says—puts as a condition, ‘that said Los Gatos Lumber Products, Inc., obtains from Small Business Administration \$150,000.00 within 90 days from date hereof within the lifetime of Carl Morton.’ That application had been made prior to the time these advances were made in October, November and December; is that right?

Mr. Rittenhouse. Portions, I believe, of the advances were made after December the third, and portions prior to December 3rd.

A. Yes.

Q. Your letter of intent bears the jurat ‘Sworn and subscribed to before me this 10th day of September, 1956’?

A. Yes.

Q. *And Mr. Gammill was fully aware of this application?*

A. *Yes.*” (Italics ours.) (T.R. pp. 72-73.)

In this connection see also testimony of Carl Morton (T.R. p. 58).

Testimony of Paul Gammill, Jr.:

“Q. You worked on the Small Business Administration with Mr. Morton, didn’t you?

A. Yes, sir.

Q. And were fully aware of the contents of the application?

A. Yes, I am—I mean——

Q. You were at the time it was presented, weren’t you, Mr. Gammill, you were familiar with the transaction?

A. I was familiar with the transaction, yes. I don’t remember the content.

Q. But you had seen it at the time?

A. Right, sir.” (T.R. p. 76.)

In Appellee’s brief on page 7, it is urged that there is uncontradicted testimony that the Morton family agreed to treat their notes as stock, *if others would lend the bankrupt funds*. With this we are in hearty agreement, and the record will clearly bear out the fact that no such loans were obtained either from the persons in Colorado, from the Small Business Administration, or from any other source. Appellee’s assignor Gammill and Morton both were fully conversant with the bankrupt’s situation and with its attempts to obtain loans, and were also completely familiar with the letter of intent which is part of the application for loan to the Small Business Administration (Claimant’s Exhibit No. 4, T.R. p. 70), which clearly shows the conditions precedent, to-wit, that all

of the Morton family agreed to convert notes to stock if that loan were to be granted.

At this point we allude to the chameleon-like position of Mr. Morton, shared by Appellee's assignor, in that when it serves a purpose, i.e., to obtain financing to enable the bankrupt to continue in business or for the purpose of selling the business, Mr. Morton states that the notes are stock; but when the petition in bankruptcy is filed, Mr. Morton lists these notes payable as such under the unsecured creditors (Summary of Debts and Assets, T.R. pp. 6-7), and the Morton family files claims in the bankruptcy proceeding based upon the notes (T.R. p. 51), but when it comes to this litigation, these notes are to be considered as stock and thus not a liability of the corporation. The peculiarity of this position is further evidenced by the fact that, for the purpose of financing and selling, a new balance sheet (Trustee's Exhibit No. 2) was made in January, 1957 (T.R. p. 56) *subsequent* to all of the conversations leading up to the execution of the chattel mortgage, and *subsequent* to the filing of the petition in bankruptcy herein (T.R. pp. 3-6), and which balance sheet *still shows* the Morton family indebtedness as "*notes payable*".

We must, at this point, make reference to the statement on page 8 of Appellant's opening brief referred to in Appellee's brief on page 6, to the effect that had the notes been changed to stock "the financial statement would not have been changed at all except that the corporation indebtedness would be to the stock-

holders rather than the note holders.” This statement we freely admit to be incorrect. It was inadvertently included in Appellant’s opening brief. We know that the crux of this matter, as stated by the referee (T.R. p. 68) is that if the indebtedness to the Morton family was considered as notes payable, the corporation was insolvent, and Appellee’s assignor knew it; whereas, if the notes payable were to be considered as stock, the converse would be true, that is, the corporation would be solvent, and Appellee would be entitled to his security.

In his brief, page 8, Appellee urges that the decision of this Court in *Costello v. Fazio*, 256 F. 2d 903 does not apply “since there was no conflict in the evidence.” We agree that there was no conflict *in the evidence*. The only conflict, as will appear from the foregoing, as well as from our discussion (Appellant’s Opening Brief, pp. 9-11), is a conflict in the “factual conclusions” drawn from the evidence by the referee. This is exactly the situation to which the *Costello* decision, *supra*, refers. It is apparent from the testimony of Appellee’s witnesses that the agreement to convert the “notes payable” to the Morton family into stock was subject to the happening of the conditions precedent above mentioned. The documentary evidence also indicates (without conflict) that no such conversion actually took place. Hence referee’s findings numbered 4 and 6 (T.R. pp. 15-16) are nothing more than “factual conclusions” which are “clearly erroneous” and as such subject to this Court’s draw-

ing therefrom "the proper conclusion", which, we submit, cannot be other than that the notes payable continued to exist as liabilities up to the date of the bankruptcy.

CONCLUSION.

In view of the facts and law hereinabove set forth, it is Appellant's contention that the chattel mortgage given by the bankrupt to Appellee's assignor was and is a preference, voidable under the provisions of Sections 60 a and b of the Bankruptcy Act, and that the order here complained of should be, by this Court, reversed, and remanded with instructions to the District Court to make and enter an order that the proof of claim of Appellee be allowed herein only as a general, unsecured claim.

Dated, Burlingame, California,
September 29, 1959.

Respectfully submitted,

SHAPRO & ROTHSCHILD,

By ARTHUR P. SHAPRO,

Attorneys for Appellant.

DANIEL ARONSON, JR.,
Of Counsel.

Nos. 16331, 16332, 16333

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REVELL, INC., etc.,

Appellants,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and United States of America,

Appellees.

SUPPLEMENT TO APPELLANTS' BRIEFS.

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Nos. 16331, 16332, 16333
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

REVELL, INC., etc.,

Appellants,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and United States of America,

Appellees.

SUPPLEMENT TO APPELLANTS' BRIEFS.

This supplement to appellants' briefs is for the purpose of adding additional authorities to support the points already made.

1.

Supplement to Part II, Pages 9-10, of Appellants' Opening Brief.

The following unbroken line of authorities is added for the proposition that, subject only to such review as the law provides, an administrative determination is a final decision, and that it is a final choice of any differing possibilities:

Appeal of Hoskins Manufacturing Co., 259 N. W. 334, 336;

Western Hospital Assn. v. Industrial Accident Board, 6 P. 2d 845, 848;

- Tracy v. MacIntyre*, 84 P. 2d 526, 528;
Hanlon v. Rollins, et al., 190 N. E. 606, 609;
New National Coal Co. v. Industrial Commission,
26 N. E. 2d 510, 512;
State v. Wright, 194 S. W. 35, 37;
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State v. Bode, 113 S. W. 2d 805, 808;
Eastman Kodak Co. v. Richards, 204 N. Y. Supp.
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Norwood Hospital v. Howton, 26 So. 2d 427, 432;
Swift v. Smith, 201 P. 2d 609, 614;
Bradner v. Vasquez, 227 P. 2d 559, 561;
People v. Escobar, 264 P. 2d 571, 573.

These cases thus add the support of historic principle, confirmed again and again, to *Terminal Wine Co. v. Commissioner*, 1 B. T. A. 697, cited in appellants' opening

brief. In that case the Tax Court, at p. 701, applied the principle in relation to its jurisdiction as follows:

“The *determination* from which a taxpayer may appeal is one which fixes the amount of *deficiency* in tax. It is the final decision by which the controversy as to the deficiency is settled and terminated, and by which a final conclusion is reached relative thereto and the extent and measure of the deficiency defined.” (Italics in original.)

2.

Supplement to Part III, Pages 10-11, of Appellants’ Opening Brief.

It has now been held expressly by the Tax Court that it has no jurisdiction to make an election between contradictory positions urged by the Commissioner. *Prizep v. Commissioner*, 18 T. C. M. 274, 284-285. This conforms to the decision in *Hulburt v. Commissioner*, 296 U. S. 300, 306, 56 S. Ct. 197, 200. In that case the Supreme Court stated:

“The duty to inquire and determine was imposed by the statute upon him [the Commissioner] and not upon an agency of government established for the purpose of revising his decision [referring to the Tax Court].”

By the same token the Tax Court has no jurisdiction to make an election between contradictory notices of deficiency. That this is clear is especially shown by the paradox which results if the taxpayer goes into the Tax Court on two or more contradictory notices and presents no evidence. What would the Tax Court do? Very obviously such notices give the Tax Court no jurisdiction.

3.

Supplement to Part V, Pages 12-13, of Appellants' Opening Brief and the Related, Final Paragraph of Appellants' Reply Brief.

It has been held that in transferee cases the procedure by notice of deficiency, continued under I. R. C. 1954 by Section 6213(a), made applicable to transferee liability by Section 6901(a), is an additional, statutory procedure, that the procedure by the government by bill in equity to impress assets with a trust, under the trust fund theory, was not affected. *Phillips-Jones Corp. v. Parmley*, 302 U. S. 233, 237, 58 S. Ct. 197, 199; *Payne v. United States* (C. A. 8), 247 F. 2d 481, 484, cert. den., 355 U. S. 923, 78 S. Ct. 367. The proceeding here, however, is not such a procedure by the government by bill in equity.

Section 7421(b), by its express terms, is only applicable to a procedure by the government pursuant to the provisions of Chapter 71, and that chapter, in Section 6901(a) as noted above, applies the statutory procedure by notice of deficiency under Section 6213(a). It follows that Section 7421(b) has no application unless there is a valid notice of deficiency.

4.

Supplement to the Statement Regarding "Protective" Practice in Appellants' Reply Brief, Page 4, Paragraph Beginning in Line 9.

The following cases may be added to those cited for the proposition that practice does not sanctify error:

Biddle v. Commissioner, 302 U. S. 573, 582, 58 S. Ct. 379;

Helvering v. Sabine Transportation Co., Inc., 318 U. S. 306, 311-312, 63 S. Ct. 569;

Russell Manufacturing Co. v. United States Court of Claims, 59-2 U. S. T. C. ¶ 9582, at p. 73446.

These cases show that even when a practice of the Commissioner is embodied in a formal regulation, the practice cannot be upheld where it is erroneous.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Appellants.

No. 16334 ✓

United States
Court of Appeals
for the Ninth Circuit

CANADIAN PACIFIC RAILWAY CO., a corpo-
ration, Appellant,
vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington, Northern Division

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No. 16334

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

BOGLE, BOGLE & GATES,
THOMAS L. MORROW,

603 Central Building,
Seattle 4, Washington,

Proctors for Appellant.

GEORGE COCHRAN DOUB,
Assistant U. S. Attorney General,
Department of Justice,
Washington 25, D. C.,

CHARLES P. MORIARTY,
United States Attorney,
U. S. Courthouse,
Seattle, Washington,

SAMUEL D. SLADE
LEAVENWORTH COLBY,
Attorneys,
Department of Justice,
Washington 25, D. C.,

KEITH R. FERGUSON,
Special Asst. to the Attorney General,
447A Post Office Building,
San Francisco, California,

Proctors for Appellee.

United States District Court, Western District of
Washington, Northern Division

In Admiralty No. 16340

UNITED STATES OF AMERICA,

Libelant,

vs.

CANADIAN PACIFIC RAILWAY CO., a corporation, as owner and operator of the SS
PRINCESS LOUISE, Respondent.

LIBEL IN PERSONAM

To the Honorable, the Judges of the Above-Entitled
Court:

The libel of the United States of America against the Canadian Pacific Railway Company, a corporation, in a cause of collision, civil and maritime, alleges upon information and belief as follows:

I.

That at all times hereinafter mentioned the libelant was and is now a sovereign and owner of the Alaska Communications System Submarine Cable in Puget Sound between Seattle and Fort Lawton, Washington, which cable was laid and maintained during all of said times, beneath the surface of the waters of Puget Sound, pursuant to and in compliance with all the statutes, rules and regulations applicable to the construction and maintenance of said cable by the libelant.

II.

That at all the times herein mentioned the respondent, Canadian Pacific Railway Company, was and is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and doing business in the City of Seattle, County of King, State of Washington, and within the jurisdiction of this Honorable Court, and was the owner and operator of the SS Princess Louise.

III.

That on March 21, 1955, while attempting to dock at Pier 65, Seattle, Washington, the SS Princess Louise did cause or permit her anchor to strike, pick up, collide with, drag out of position and break said Alaska Communications System Submarine Cable.

IV.

That the striking of said cable with said anchor as aforesaid and the consequent damages to and break in the cable were not caused or contributed to by libelant, said cable being properly placed, marked and maintained; but were caused solely by the fault and negligence of the respondent, SS Princess Louise, and those in charge of her, in the following respects, among others presently unknown to the libelant which will be pointed out at the trial hereof:

(1) That those in charge of said steamship failed to avoid striking said cable with the anchor or anchors of said vessel.

(2) That those in charge of said vessel were in-

competent, inefficient and inattentive to their duties.

(3) That those in charge of said vessel did drop its anchor and drag it into the known area of the said cable in violation of the restrictions against anchoring or dropping an anchor in the cable area in which said submarine cable was laid and maintained.

(4) That those in charge of said vessel did negligently drop the anchor upon and in the vicinity of said cable or did negligently allow said anchor to drag and come in contact with the said cable on its proper station, said cable being plainly charted and marked.

V.

In consequence of said damage and break in the Alaska Communications System Submarine Cable the necessary repairs have been accomplished at the reasonable sum of approximately seven thousand eighteen dollars and thirty-two cents (\$7,018.32), in which sum libelant herein has been damaged.

VI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the practise of this Honorable Court in causes of Admiralty and Maritime jurisdiction may issue against said respondent and that it be cited to appear and answer on oath all and singular the matters aforesaid and that this

Honorable Court be pleased to decree to libelant its damages with interests and costs; and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ KEITH R. FERGUSON,
Special Asst. to the Attorney
General,

/s/ JACOB A. MIKKELBORG,
Assistant U. S. Attorney,
Proctors for Libelant United
States of America.

Duly Verified.

[Endorsed]: Filed October 24, 1957.

[Title of District Court and Cause.]

ANSWER

The answer of respondent, Canadian Pacific Railway Company, a corporation, to the libel of the United States of America, in an alleged cause of collision, civil and maritime, respectfully shows:

I.

Admits that the libelant is the owner of the Alaska Communications System submarine cable in Puget Sound between Seattle and Fort Lawton, Washington, which cable extends below the surface

of the waters of Puget Sound; and denies the remaining allegations of Article I thereof.

II.

Admits the allegations of Article II thereof.

III.

Admits the admiralty and maritime jurisdiction of the United States and this Honorable Court, and denies the remaining allegations of Articles III, IV, V and VI thereof.

IV.

Respondent alleges that if the anchor of the SS Princess Louise struck and damaged the said Alaska Communications System submarine cable on or about March 21, 1955 while attempting to dock at Pier 65, Seattle, Washington, such damage was caused without fault or neglect on the part of the respondent, the SS Princess Louise, her officers and crew.

Wherefore, respondent prays that the libel herein be dismissed and that respondent have and recover its costs and disbursements herein.

BOGLE, BOGLE & GATES,
/s/ THOMAS L. MORROW,
Proctors for Respondent.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 11, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of a pretrial conference heretofore had on August 12, 1958 in Room 1016 of the United States Court House, Seattle, Washington, the libelant was represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, Richard F. Broz, Assistant United States Attorney for said District, and Jacob A. Mikkelsen, Assistant United States Attorney for said District, and respondent was represented by Bogle, Bogle & Gates, their attorneys of record, and the following issues of fact and law were framed and exhibits identified:

Admitted Facts

The following are the admitted facts herein:

1. That the libelant was at all times libelant herein, and is now a sovereign and owner of the Alaska Communications System Submarine Cable in Puget Sound between Seattle and Fort Lawton, Washington, which cable was laid and maintained during all times relevant to the subject action beneath the surface of the waters of Puget Sound.

2. That at all times pertinent to the subject action the respondent Canadian Pacific Railway Company was and is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada and doing business in the City of Seattle, County of King, State of Washington, and within the jurisdiction of this Honorable Court,

and was the owner and operator of the SS Princess Louise.

3. That on March 21, 1955 the SS Princess Louise was engaged in docking activities in the vicinity and at Pier 64, Seattle, Washington. That the submarine cable referred to in paragraph 1 above was parted during the week of March 20, 1955, necessitating subsequent repairs by the said Alaska Communications System.

4. That the cause of action as alleged is within the admiralty and maritime jurisdiction of the United States and of this Court.

Libelant's Contentions

Libelant's contentions are as follows:

1. That the parting of said cable was occasioned by the negligent maneuvering by the SS Princess Louise and the consequent damages to and break in the cable were not caused or contributed to by libelant, said cable being properly placed, marked and maintained; but were caused solely by the fault and negligence of the respondent, SS Princess Louise, and those in charge of her, in the following respects, among others presently unknown to the libelant which will be pointed out at the trial hereof:

(a) That those in charge of said steamship failed to avoid striking said cable with the anchor or anchors of said vessel.

(b) That those in charge of said vessel were incompetent, insufficient and inattentive to their duties.

(c) That those in charge of said vessel did drop its anchor and drag it into the known area of the said cable in violation of the restrictions against anchoring or dropping an anchor in the cable area in which said submarine cable was laid and maintained.

(d) That those in charge of said vessel did negligently drop the anchor upon and in the vicinity of said cable or did negligently allow said anchor to drag and come in contact with the said cable on its proper station, said cable being plainly charted and marked.

2. In consequence of said damage and break in the Alaska Communications System Submarine Cable the necessary repairs have been accomplished at the reasonable sum of approximately nine thousand dollars (\$9,000.00), in which sum libelant herein has been damaged.

Respondent's Contentions

Respondent's contentions are as follows:

1. That the cable was not broken, parted or damaged by the respondent.

2. That the cable was not broken, parted or damaged in a known or marked cable area.

3. That the respondent was guilty of no fault or negligence under the circumstances.

4. That fault or negligence on the part of the respondent, if any, was not the proximate cause of the alleged loss or damage.

5. That the libelant has the burden of proving fault or negligence of respondent, and that such

fault or negligence was the proximate cause of the alleged loss or damage.

Issues of Fact

The following are the issues of fact to be determined by the Court herein:

1. Was the subject cable broken, parted or damaged by the respondent.
2. Was the said cable damaged in a known or marked cable area.
3. Was the respondent at fault or negligent, and if so, was such fault or negligence the proximate cause of the alleged damage to the cable.
4. What damages, if any, did libelant sustain as a proximate result of the negligence or fault, if any, of the respondent.

Issues of Law

The following are the issues of law to be determined by the Court herein:

1. Was the respondent at fault or negligent, and if so, was such fault or negligence the proximate cause of the alleged damage to the cable; what damages, if any, did libelant sustain as a proximate result of the negligence or fault, if any, of the respondent.

Exhibits

The following exhibits were produced and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be:

Libellant's Exhibits

L-1. C.&G.S. map 6449, corrected to March 21, 1955.

L-2. C.&G.S. certified copy of sounding chart.

L-3. C.&G.S. certified copy of tide record for March 21, 1955.

L-4. Log of Alaska Communications System Cable Ship Lenoir.

L-5. Copy of War Department permit under date 16 June 1949 relating to installation of submarine cable from Seattle to Fort Lawton.

Respondent's Exhibits

R-1. C.&G.S. (Coast & Geodetic Survey) map 6449.

R-2. Pilot house log of SS Princess Louise.

R-3. Engine room log of SS Princess Louise.

R-4. Time Sheet—March, 1955—of SS Princess Louise.

R-5. Port of Seattle Map of Seattle Harbor (issued 1937).

Action by the Court

The Court has set this case for trial on August 19, 1958.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon; and upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended

except by agreement of the parties and approval of the Court.

Done in Open Court this 19th day of August, 1958.

/s/ JOHN C. BOWEN.

Approved:

BOGLE, BOGLE & GATES,
/s/ By THOMAS L. MORROW,

Attorneys for Respondent.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ JACOB A. MIKKELBORG,
Assistant U. S. Attorney,

/s/ RICHARD F. BROZ,
Assistant U. S. Attorney,

Attorneys for Libelant.

[Endorsed]: Filed August 19, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial on August 19, 1958 before the Honorable John C. Bowen, Judge of the above entitled Court, libelant United States of America being represented by its proctors, Jacob A. Mikkeltorg and Richard F. Broz,

Assistant United States Attorneys for the Western District of Washington, the respondent Canadian Pacific Railway Co., a corporation, being represented by its proctors, Bogle, Bogle & Gates and Thomas L. Morrow, evidence being introduced, witnesses being heard and documentary evidence being introduced, the Court being fully advised in the premises, now makes the following:

Findings of Fact

I.

That libelant, United States of America, is now and was during all the times herein mentioned a sovereign and owner of the United States Army Alaska Communications System Submarine Cable in Puget Sound laid between Pier 57, Seattle, and Fort Lawton, Washington, beneath the surface and on the bottom of Elliott Bay and Puget Sound.

II.

That said submarine cable was lawfully located and installed and maintained in accordance with the permit issued therefor by the War Department of the United States in 1949.

III.

That said submarine cable area was marked and charted on mariners' harbor charts of Elliott Bay and Puget Sound in general distribution among and available to all mariners on March 21, 1955 and for years prior thereto, and that said cable area was also posted with large signs warning of the cable area and warning against anchoring therein.

IV.

That on March 21, 1955, SS Princess Louise, a cargo and passenger merchant steamer of 320 feet in length owned and operated by Canadian Pacific Railway Co., Inc., was engaged in docking maneuvers in Seattle Harbor in the vicinity of said cable area between the hours of 3:00 P.M. and 4:00 P.M. on said date.

V.

That the Master and those in charge of SS Princess Louise at the time of her maneuvers on March 21, 1955 and for years prior thereto knew of and were charged with knowledge of the existence and boundaries of the said cable area and submarine cables laid therein.

VI.

That the SS Princess Louise and those in charge of her did negligently drop and use her anchor in such close proximity to the cable area as to be unable to avoid contact with said submarine cable on the bottom laid therein.

VII.

That the said anchor of SS Princess Louise was dropped and dragged while said ship was engaged in maneuvering in a southeasterly 35-mile wind between the hours of 3:00 P.M. and 4:00 P.M. on March 21, 1955, and as the result of said maneuvers did come into contact with and damage said submarine cable within the charted boundaries of said cable area and did break said submarine cable.

VIII.

That the Master and those in charge of the SS Princess Louise failed to accurately observe and maintain her position clear of the charted, posted and known cable area while at the same time dragging her anchor to assist them in controlling her maneuvers.

IX.

That the failure to accurately observe and maintain the positions and maneuvers of the Princess Louise clear of the charted, posted and known cable area while so engaged was the proximate cause of the fouling and damage to said submarine cable by SS Princess Louise.

X.

That the fouling and damage to said submarine cable within the known cable area by dragging an anchor therein was or should have been foreseeable by the Master and those in charge of her maneuvers.

XI.

That the breaking of said cable by SS Princess Louise is further supported by her presence in the cable area with her anchor down and dragging, and by the absence of any other ship in said area at the time.

XII.

That the libelant, United States of America, as the proximate result of said damage to and breaking of said submarine cable, sustained direct damages in the total sum of \$6,954.23 for repair of said submarine cable, said damages being constituted of

direct labor, subsistence, fuel, cable and cable supplies expended, depreciation and overhead incurred in the period reasonably required for performance of repair by the United States Army cable repair ship Lenoir.

XIII.

That the SS Princess Louise and those in charge of her were solely at fault and that their negligence was the proximate cause of the damage to and breaking of the United States Army Alaska Communications System submarine cable between Seattle and Fort Lawton.

XIV.

That the libelant United States of America was not at fault and did not by any act contribute to the damage to said submarine cable which was operating and in use prior to 3:00 P.M. on March 21, 1955 and found to be inoperative at 4:00 P.M. on said date.

Done in Open Court this 15th day of September, 1958.

/s/ JOHN C. BOWEN,

United States District Judge.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That this Court has jurisdiction of the subject matter and parties herein.

II.

That in the fouling, damage and breaking of the United States Army Alaska Communications System submarine cable between Seattle and Fort Lawton, the SS Princess Louise was solely at fault and her negligence and the negligent acts and omissions of those in charge of her proximately caused the damage to said submarine cable.

III.

That the respondent, Canadian Pacific Railway Co., a corporation, owner of SS Princess Louise, is liable in personam to libelant, United States of America, for the sum of \$6,954.23, together with libelant's taxable costs, as the damages directly and proximately resulting from the negligent acts and omissions of the respondent and those in charge of the maneuvers of SS Princess Louise at the time she fouled, damaged and parted libelant's submarine cable.

IV.

That libelant, United States of America, is entitled to a decree to be entered in its favor and against the respondent Canadian Pacific Railway Co., a corporation, for the sum of \$6,954.23, together with libelant's costs.

Done in Open Court this 15th day of September, 1958.

/s/ JOHN C. BOWEN,

United States District Judge.

Approved and Presented by:

/s/ JACOB A. MIKKELBORG,
Assistant U. S. Attorney,
Proctor for Libelant.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 15, 1958.

United States District Court, Western District of
Washington, Northern Division

In Admiralty No. 16340

UNITED STATES OF AMERICA,

Libelant,

vs.

CANADIAN PACIFIC RAILWAY CO., a cor-
poration, as owner and operator of the SS
PRINCESS LOUISE, Respondent.

DECREE

This matter having come on for trial on the 19th, 20th, 21st and 22nd day of August 1958 before the Honorable John C. Bowen, Judge of the above entitled Court, libelant United States of America being represented by its proctors Jacob A. Mikkeltborg and Richard F. Broz, Assistant United States Attorneys, respondent Canadian Pacific Railway Co., Inc., being represented by Thomas L. Morrow, Bogle, Bogle & Gates, evidence being introduced, witnesses being heard and documentary evidence being introduced, and Findings

of Fact and Conclusions of Law having been made and entered and the same having been filed with the Clerk of this Court, now therefore it is hereby

Ordered, Adjudged and Decreed that the libelant United States of America do have and recover from respondent Canadian Pacific Railway Co., Inc., the sum of \$6,954.23 together with libelant's costs now taxed at \$108.38.

Done in Open Court, this 15th day of September, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and Approved by:

/s/ JACOB A. MIKKELBORG,
Assistant U. S. Attorney.

Acknowledgment of Service Attached.

[Endorsed]: Filed September 15, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Canadian Pacific Railway Co., respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on the 15th day of September, 1958.

Dated this 9th day of December, 1958.

BOGLE, BOGLE & GATES,
Attorneys for Respondent.

[Endorsed]: Filed December 12, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND

Know All Men by These Presents:

That American Surety Company of New York, a corporation created, organized and existing under and by virtue of the laws of the State of New York, having its principal place of business in the City of San Francisco, State of California, and duly authorized to carry on a general casualty insurance business within the State of Washington and in the Courts of the United States, is held and firmly bound unto the United States of America, libelant, in the full and just sum of Ten Thousand Dollars (\$10,000), to be paid to the said United States of America, its administrators, executors, successors or assigns, to which payment, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Signed and sealed this 12th day of December, 1958.

Whereas, on September 15, 1958, in an action pending in the United States District Court for the Western District of Washington, between the United States of America, libelant, and Canadian Pacific Railway Co., as respondent, civil action in Admiralty No. 16340, final judgment was rendered in favor of the said libelant, United States of America, and against Canadian Pacific Railway Co., respondent, for Six Thousand Nine Hundred Fifty-four Dollars and Twenty-three Cents (\$6,954.23), together with costs in the sum of One Hundred

Eight Dollars Thirty-eight Cents (\$108.38); and the said respondent, Canadian Pacific Railway Co., having filed a notice of appeal from such judgment to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said respondent, Canadian Pacific Railway Co., shall prosecute its appeal to effect and shall satisfy the judgment in full, together with costs, interests and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interests and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] AMERICAN SURETY COMPANY
OF NEW YORK,

/s/ By B. L. LEASURE,
Its Attorney in Fact.

Bond #37-580-957.

Approved as to form and amount:

/s/ JACOB A. MIKKELBORG,
Assistant U. S. Attorney.

Approved: December 12, 1958.

/s/ JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed December 12, 1958.

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANT WILL RELY

1. The trial court correctly found and concluded that the United States Army Alaska Communications System Submarine Cable was lawfully located and installed in accordance with the 1949 permit issued therefor by the War Department of the United States. Findings of Fact II.

2. The trial court erred in finding and concluding that the said Submarine Cable was maintained in accordance with said 1949 War Department permit. Findings of Fact 11.

3. The trial court erred in failing to find and conclude that early in 1953 the said Submarine Cable was relocated by the cable ship Basil O. Lenoir in a location substantially differing from that provided for in said 1949 War Department permit.

4. The trial court erred in failing to find and conclude that said Submarine Cable as relocated in 1953 and as maintained on March 21, 1955 extended outside the marked boundaries of the cable area as marked on mariners' charts.

5. The trial court correctly found and concluded that the submarine cable area as authorized by the War Department permit in 1949, was marked and charted on Mariners' Harbor Charts of Elliott Bay and Puget Sound in general distribution among and available to all mariners on March 21, 1955 and for years prior thereto, and that said cable area

was also posted with large signs warning of the cable area and warning against anchoring therein. Findings of Fact III.

6. The trial court erred in failing to find and conclude that Mariners' Harbor Charts of Elliott Bay and Puget Sound in general distribution among and available to all mariners on March 21, 1955, did not encompass the area of said Seattle-Fort Lawton submarine cable as relocated in early 1953 and so maintained on March 21, 1955.

7. The court erred in finding and concluding that the Master and those in charge of the SS Princess Louise at the time of her maneuvers on March 21, 1955 and for years prior thereto knew of and were charged with knowledge of the existence and boundaries of said cable area and submarine cables laid therein, insofar as said finding and conclusion refer to said Seattle-Fort Lawton submarine cable relocated out of position in 1953. Findings of Fact V.

8. The trial court erred in failing to find and conclude that the Master and those in charge of the SS Princess Louise at the time of her maneuvers on March 21, 1955, had no information or knowledge that said United States Army Alaska Communications System Submarine Cable had been relocated in 1953 and maintained out of position and outside the marked boundaries of a cable area appearing on Mariners' Harbor Chart of Elliott Bay and Puget Sound and in general distribution to mariners on March 21, 1955.

9. The trial court erred in finding and conclud-

ing that the SS Princess Louise and those in charge of her did negligently drop and use her anchor in such close proximity to the cable area as to be unable to avoid contact with the said submarine cable on the bottom laid therein. Findings of Fact VI.

10. The trial court erred in failing to find and conclude that the SS Princess Louise and those in charge of her exercised good seamanship in the paramount interests of the safety of the ship and the passengers and crew aboard in the dropping of her anchor and use of her anchor and in due regard to the marked cable area.

11. The trial court erred in finding and concluding that as a result of the maneuvers of the SS Princess Louise that she did come in contact with the said submarine cable within the charted boundaries of said cable area. Findings of Fact VII.

12. The trial court erred in finding and concluding that the anchor of the SS Princess Louise on March 21, 1955, did come into contact with and damage and break said submarine cable.

13. The trial court erred in failing to find and conclude that if the anchor of the SS Princess Louise during maneuvers did come into contact with and damage said submarine cable and break the same, that the said submarine cable at the point of contact with said anchor was not within the charted boundaries of said cable area.

14. The trial court erred in failing to find and conclude that there was not sufficient evidence to

establish that the anchor of the SS Princess Louise came into contact with and damaged said submarine cable during maneuvers during the hours of 3:00 P.M. and 4:00 P.M. on March 21, 1955.

15. The trial court erred in finding and concluding that the Master and those in charge of the SS Princess Louise failed to accurately observe and maintain her position clear of the charted, posted and known cable area, while at the same time dragging her anchor to assist them in controlling her maneuvers. Findings of Fact VIII.

16. The trial court erred in failing to find and conclude that the Master and those in charge of the SS Princess Louise had no notice and knowledge that the said submarine cable had been relocated in 1953 and was out of position on March 21, 1955.

17. The trial court erred in failing to find and conclude that the Master and those in charge of the SS Princess Louise on March 21, 1955 maneuvered said vessel properly and in respect to the submarine area as marked on their existing Mariners' Charts.

18. The trial court erred in finding and concluding that the failure to accurately observe and maintain the positions and maneuvers of the SS Princess Louise clear of the charted, posted and known cable area was the proximate cause of the fouling and damage to said submarine cable by the SS Princess Louise. Findings of Fact IX.

19. The trial court erred in failing to find and

conclude that the sole proximate cause of fouling and damage to said submarine cable by the SS Princess Louise or some other vessel was libelant's relocation and maintaining said submarine cable outside and beyond the boundaries of the cable area as marked on mariners' charts and/or failure of the libelant to provide and mark mariners' charts so as to show said submarine cable as relocated.

20. The trial court erred in finding and concluding that the fouling and damage to said relocated submarine cable was, or should have been, foreseeable by the Master and those in charge of her maneuvers. Findings of Fact X.

21. The trial court erred in failing to find and conclude that the fouling and damage, if any, to said submarine cable was not within a known cable area and that the Master and those in charge of the maneuvers of the SS Princess Louise could not, therefore, foresee that the dragging of an anchor would foul or cause damage to said submarine cable.

22. The trial court erred in finding and concluding that the breaking of said cable by the SS Princess Louise is further supported by her presence in the cable area with her anchor down and dragging, and by the absence of any other ship in said area at the time. Findings of Fact XI.

23. The trial court erred in failing to find and conclude that libelant had failed to establish by a fair preponderance of the evidence that the anchor

of the SS Princess Louise contacted, broke and damaged said submarine cable by having her anchor down during maneuvers between 3:00 P.M. and 4:00 P.M. on March 21, 1955.

24. The trial court erred in finding and concluding that the libelant, as a proximate result of the breaking of said submarine cable, sustained direct damages in the total sum of Six Thousand Nine Hundred Fifty-four and 23/100 Dollars (\$6,954.23) for repair of said submarine cable. Findings of Fact XII.

25. The trial court erred in failing to find and conclude that libelant had not sustained the burden of proving damages resulting from the breaking of said submarine cable.

26. The trial court erred in finding and concluding that the SS Princess Louise and those in charge of her were solely at fault and their negligence was the proximate cause of damage to and breaking of the United States Army Alaska Communications System Submarine Cable between Seattle and Fort Lawton. Findings of Fact XIV.

27. The trial court erred in finding and concluding that the libelant, United States of America, was not at fault and did not by any act contribute to the damage to said submarine cable which was operating and in use prior to 3:00 P.M. on March 21, 1955 and found to be inoperative at 4:00 P.M. on said date. Findings of Fact XIV.

28. The trial court erred in failing to find and

conclude that the libelant, United States of America, was at fault in relocating and maintaining said submarine cable outside the marked cable area and contrary to the War Department permit of 1949 and that its faults caused and contributed to the damages to said submarine cable.

29. The trial court erred in concluding as a matter of law that in the fouling, damage and breaking of the United States Army Alaska Communications System Submarine Cable between Seattle and Fort Lawton, the SS Princess Louise was solely at fault and her negligence and the negligent acts and omissions of those in charge of her proximately caused the damage to said submarine cable. Conclusions of Law II.

30. The trial court erred in concluding as a matter of law that the respondent is libel in personam to libelant, United States of America, for the sum of \$6,954.23, together with libelant's taxable costs, as the damages directly and proximately resulting from the negligent acts and omissions of the respondent and those in charge of the maneuvers of the SS Princess Louise at the time she fouled, damaged and parted libelant's submarine cable. Conclusions of Law III.

31. The trial court erred in concluding as a matter of law that the libelant, United States of America, is entitled to a decree to be entered in its favor and against respondent, Canadian Pacific Railway Co., a corporation, for the sum of \$6,954.23, together with libelant's costs. Conclusions of Law IV.

32. The trial court erred in failing to conclude as a matter of law that if the United States Army Alaska Communications System Submarine Cable between Seattle and Fort Lawton was fouled, damaged or broken, libelant was solely at fault for relocating and maintaining said submarine cable contrary to the 1949 War Department permit and outside the marked cable area and in failing to publish and issue charts showing the cable area as enlarged by said relocation.

33. The trial court erred in admitting and considering hearsay evidence on the question of damages.

34. The trial court erred in refusing to admit and consider respondent's Exhibit A-11, being Coast & Geodetic Survey Chart 6446, published subsequent to March 21, 1955, and showing an enlarged cable area.

35. The trial court erred in awarding a decree to libelant for damages and in failing to grant a decree in favor of respondent and dismiss the action.

36. The trial court erred in failing to assess and to take into consideration libelant's fault.

BOGLE, BOGLE & GATES,

/s/ By THOMAS L. MORROW,

Proctors for Respondent.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 13, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America

Western District of Washington—ss.

I, John A. Burns, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and designation of counsel, I am transmitting herewith as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, the following original papers in the file dealing with the action, said papers being identified as follows:

1. Libel, filed Oct. 24, 1957.

6. Answer of Canadian Pacific Railway Company, filed 12-11-57.

18. Pretrial Order, filed Aug. 19, 1958.

21. Findings of Fact and Conclusions of Law, filed 9-15-58.

23. Decree, filed Sept. 15, 1958.

24. Motion to Amend Findings of Fact, Conclusions of Law and Judgment, filed Sept. 25, 1958.

25. Motion for New Trial, filed Sept. 25, 1958.

26. Order Denying Motion to Amend Findings of Fact, Conclusions of Law and Decree, filed Oct. 13, 1958.

27. Order Denying Motion for New Trial, filed Oct. 13, 1958.

28. Notice of Appeal, filed Dec. 12, 1958.

29. Supersedeas and Cost Bond, filed Dec. 12, 1958.

30. Order for Transmission of original exhibits, filed Jan. 13, 1959.

31. Designation of Contents of Record on Appeal, filed Jan. 13, 1959.

32. Statement of Points Upon Which Appellant Will Rely, filed Jan. 13, 1959.

33. Court Reporter's Transcript of Proceedings (Statement of Facts) in two volumes, filed Jan. 14, 1959.

Libelant Exhibits 1 to 5 inclusive, and

Respondent Exhibits A-1, and A-2 to A-11 inclusive.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by proctors for appellant.

Witness my hand and official seal at Seattle this 15th day of January, 1959.

[Seal]

JOHN A. BURNS,
Clerk,

/s/ By TRUMAN EGGER,
Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 16340

UNITED STATES OF AMERICA

Libelant,

vs.

CANADIAN PACIFIC RAILWAY CO., a
corporation, as owner and operator of the
SS PRINCESS LOUISE,

Respondent.

TRANSCRIPT OF PROCEEDINGS

Be it remembered, that the above-entitled and numbered cause was heard before the Honorable John C. Bowen, a Judge of the above-entitled Court, beginning Tuesday, August 19, 1958, at 10:10 o'clock a.m.

The libelant was represented by Mr. Jacob A. Mikkeltborg and Mr. Richard F. Broz, Assistant United States Attorneys.

The respondent was represented by Mr. Thomas L. Morrow, of Messrs. Bogle, Bogle & Gates, Attorneys at Law.

Whereupon, the following proceedings were had and done, to-wit: [1]

The Court: In the case of United States of America versus Canadian Pacific Railway Co., are

*Page numbering appearing at foot of page of original certified Reporter's Transcript.

the parties and Counsel ready to proceed with the trial of that case?

Mr. Morrow: Ready, your Honor.

Mr. Mikkeltborg: Ready, your Honor.

The Court: I understood there was to be settled and offered for entry a pretrial order.

(Thereupon, the pretrial order was settled and entered.)

(Mr. Mikkeltborg made an opening statement in behalf of libelant.)

(Mr. Morrow made an opening statement in behalf of respondent.)

The Court: The libelant may call its first witness or otherwise proceed.

Mr. Mikkeltborg: The libelant will call as its first witness Captain Campbell of the Princess Louise.

The Court: Come forward and be sworn as a witness, Captain Campbell. [2]

JOHN A. CAMPBELL

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mikkeltborg): Will you please state your name, sir?

A. John A. Campbell.

Q. Will you spell it, please?

A. C-a-m-p-b-e-l-l.

Q. Captain, what was your position in March of 1955?

A. I was master on the Princess Louise.

(Testimony of John A. Campbell.)

Q. With regard to the Princess Louise, Captain, would you state her general description, that is her size, her length, her beam, her tonnage, her engines, her screw, type of engines, and that general information?

A. Well, she's approximately 320 feet long, 4,000 tons, triple expansion single screw, beam of about 50 feet.

Q. By "triple expansion" do you mean that she has reciprocating type engines?

A. Reciprocating, yes.

Q. Captain, who is the owner of the Princess Louise?

A. The Canadian Pacific Railway Company.

Q. Captain, where was the Princess Louise on the afternoon of March 21st?

A. In Seattle harbor, in the usual course of events. [3]

Mr. Mikkeltorg: That will be all. You may cross examine, Counsel.

The Court: Having in mind that possibly your side will call this witness as its witness.

Mr. Morrow: I have no questions at this time.

The Court: You may step down, Captain.

The Witness: Thank you, sir.

(Witness excused.)

The Court: Call the next witness.

Mr. Broz: If it please the Court, the next witness will be Colonel George F. Rogers.

The Court: Colonel Rogers will come forward and be sworn as a witness.

GEORGE F. ROGERS,

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Broz): Colonel, will you state your name, address and occupation, please?

A. George F. Rogers, Office Chief Signal Officer, Washington 25, D. C., Colonel, United States Army.

Q. What branch of the Army are you in, Colonel?

A. Signal Corps. [4]

Q. How long have you been in the Signal Corps? A. Since April of '42.

Q. How long have you been engaged in your present duties?

A. February 1st, 1957—'8.

Q. And what did you do before that?

A. Prior to that I was in Japan, commanding long lines for all the military services in Japan.

Q. And what was your duty assignment prior to your assignment in Japan?

A. Executive Officer, Alaska Communication System.

Q. Was that in Seattle, Washington?

A. At Seattle, Washington.

Q. How long did you hold that post?

A. I left there in September of '55, I came out in September of '52.

Q. What were your duties as executive officer for the Alaska Communication System?

(Testimony of George F. Rogers.)

A. I was assistant to the C.O. I assisted him in operation, maintenance, running the system. When he was away I commanded in his absence.

Q. Did your duties include the supervision and maintenance of submarine cables?

A. Yes, sir. That's part of the system.

Q. Are you acquainted with the position of the Alaska Communication System cable between Seattle and Fort [5] Lawton?

A. Yes, sir.

Q. Was that a submarine cable under the jurisdiction of the Alaska Communication System during your tour of duty? A. It was.

Q. Was that cable in operation during March of 1955? A. Yes, it was.

Q. Can you state——

The Court: Were you on that duty at that time, the duty you just described the next before the last answer? A. Yes, sir.

The Court: You may proceed.

Q. (By Mr. Broz): Can you state where the Seattle end of the cable terminates?

A. It terminates in a manhole off of Pier 57.

Q. Are you acquainted with the Seattle waterfront?

A. That area down around there I am, yes, sir.

Q. Do you know where Pier 57 is?

A. Yes, sir.

Q. Colonel Rogers, directing your attention to the date of March 21, 1955, do you recall anything

(Testimony of George F. Rogers.)

that happened on that day in the vicinity of Pier 57?

A. Yes, sir.

Q. State what you observed. [6]

A. The Princess ship busted our cable.

The Court: When did that happen?

A. On the——

Mr. Morrow: I object. I object and move that the answer be stricken as not responsive.

The Court: Read the question.

Mr. Morrow: He couldn't see whether the Princess ship busted the cable, it was in 180 feet of water.

The Court: That is sufficient. Read the question.

(The reporter read the last question.)

The Court: That objection is overruled.

Q. (By Mr. Broz): Now, Colonel Rogers——

The Court: That date was what, please?

A. March 21st, sir.

The Court: You may proceed.

Q. (By Mr. Broz): Colonel, will you state what you observed which led you to the conclusion which you have just stated?

A. Oh, I could see out of the window in our office that this Princess ship was having trouble docking.

Q. Where was your office?

A. My office was in the fifth floor of the Federal Office Building down on First Street. [7]

Q. Could you see from your office window the area surrounding Pier 57 in Seattle harbor?

A. Yes, sir.

(Testimony of George F. Rogers.)

Q. What did you observe?

A. This Princess ship was having difficulty docking at the CPR dock.

Q. Did you see the——

The Court: Wait just a minute. Do not interrupt him. I want him to answer the question and everything that is responsive to this. Read the last question, because the answer was previously objected to and the Court has made a ruling, but the subject remains before the Court and if it is not proper when we get through the Court is going to sustain the objection.

(The reporter read the last question.)

The Court: Now if you know what you observed I want you to state exactly what you saw with your eyes.

A. There was a heavy wind blowing. There was a considerable amount of whitecaps on the bay. The Princess ship was having difficulty docking. I was watching from the window. She backed out down towards over our cable area and she had an anchor dragging at that time.

The Court: Pardon?

A. She had the anchor, the anchor was [8] dragging at that time. That's the end of what I observed.

Q. (By Mr. Broz): Where did you first——

Mr. Morrow: I'm sorry, I didn't get part of the answer.

The Court: Read the answer, Mr. Reporter.

(The reporter read the last two answers.)

(Testimony of George F. Rogers.)

The Court: Now wait just a moment. The Court's ruling previously announced on the objection to his previous statement that this vessel, the Princess Louise, busted the cable, is withdrawn. That objection is sustained. The Court will disregard that part of his statement.

Q. (By Mr. Broz): Colonel, where was the Canadian Pacific ship which you observed on March 21, 1955, when you first noticed her?

A. Just off the CPR dock. She was part—she overhung the dock somewhat.

Q. Do you know which pier that is?

A. That's the Canadian Pacific dock.

Q. Do you know the number of the pier?

A. I believe it's Pier 67. I'm not sure about that.

Q. What time of the day did you observe this?

A. This was around 3:00 o'clock in the afternoon.

The Court: Do you know at the foot of what [9] street the dock is? If so, state the name of the street.

A. No, sir, I do not. I could see it plainly from my room.

The Court: How long have you been stationed in your present work in Seattle?

A. I left Seattle in 1955, sir.

The Court: And when did you come back again at any time? Have you worked here any more?

A. No, sir.

The Court: You may inquire.

(Testimony of George F. Rogers.)

Q. (By Mr. Broz): Did the Princess ship subsequently move towards the vicinity of Pier 57?

A. Yes, sir, she did.

Q. Do you know where Pier 57 is in Seattle?

A. Yes, sir.

Q. Do you know at the foot of which street Pier 57 is?

A. No. It's just down to the right of Ivar's Restaurant down there.

Q. How far away was Pier 57 from your office building?

A. About three hundred yards.

Q. Did you observe the Canadian Pacific vessel enter into the cable area off Pier 57?

A. Yes, sir. She backed into it.

Q. Can you state how far off Pier 57 the Canadian Pacific [10] vessel was when you observed her?

A. About two lengths, two ship lengths.

Q. Is that to the best of your recollection?

A. Two to three. That's the best of my recollection.

Q. To the best of your recollection would you say that it was six hundred feet?

A. Yes, six hundred feet is right.

The Court: How far in yards would you estimate the vessel was in that docking maneuver from the location of your desk or position in your office?

A. Six hundred yards.

The Court: How many feet is that, 1800 or thereabouts?

(Testimony of George F. Rogers.)

A. 18—my mathematics may be wrong here, your Honor.

The Court: In what building or pier was your office?

A. My office was on the fifth floor of the Federal Building.

The Court: The Federal Office Building at the foot of Madison Street and First Avenue?

A. Yes, sir.

The Court: And this pier was the same Canadian Pacific pier that is now in use, is it?

A. Yes, sir, but we're talking now about [11] Pier 57, where the ship come down over our area.

The Court: I am talking about the entrance to the slip and to the docking activity, the location of the docking activity of the vessel where the Canadian Pacific's dock now is. Is that what you are talking about?

A. No, sir. Counsel asked me how far the ship was off of Pier 57.

The Court: Very well. How far was it off Pier 57; then, if you know where Pier 57 was and know that distance?

A. It was about two ship lengths off of Pier 57.

The Court: What is Pier 57? Is that the location of your office?

A. Pier 57 is the pier that our cable comes in at.

The Court: But where is your office?

A. My office was in the Federal Office Building.

The Court: And how far is it from the place

(Testimony of George F. Rogers.)

where you observed this vessel docking and having trouble in connection with its docking operations on March 21, 1955?

A. Well, their trouble started down at the [12] Canadian pier.

The Court: No, I want to know how far your office is from that place, or was. Is that the place you referred to as about 600 yards?

A. I would put the ship as about 600 yards off from my office after it got into the cable area.

The Court: That is sufficient. You may proceed.

Q. (By Mr. Broz): Did you observe the position of the anchor when the ship was off Pier 57?

A. Yes, sir.

Q. What was the position of the anchor?

A. It was stretched out, the anchor was in the water and the anchor chain stretched out.

Q. Towards which direction?

A. The chain toward—the anchor towards shore, stretched towards the bay.

Q. What happened after you observed this?

A. I called our engineer department and told them to be prepared to repair the cable, that there was a ship in over it with her anchor dragging and they could expect trouble momentarily. I called our traffic department and told them that they could expect to have the cable interrupted momentarily and to make some arrangements to get some other line in place of it. [13]

Q. Did you ascertain later whether or not in fact the cable had been broken?

(Testimony of George F. Rogers.)

A. It was reported to me later that the cable was broken and interrupted.

Q. When did you receive that report?

A. Well, this was before I went home. We quit at 5:00 o'clock. Prior to going home I was informed of this.

Q. Did you observe any other vessels in the cable area during the period when you observed the Canadian Pacific vessel attempting to dock?

A. No, sir, I did not.

Q. Did you observe a tug alongside the cable?

A. There was a tug there working with the vessel.

Q. Did you observe any other vessels in that area?

A. No, sir, I did not, not to my recollection. I don't recall any.

Mr. Broz: You may cross examine.

Cross Examination

Q. (By Mr. Morrow): Colonel Rogers, how long have you been with the United States Army?

A. Since April, 1932—'42.

Q. Did you go to West Point?

A. Yes, I did. [14]

Q. What was your class?

(Witness refers to a paper.)

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

A. Class of 1930.

(Testimony of George F. Rogers.)

Q. (By Mr. Morrow): When were you promoted to full colonel?

A. When I was here in Seattle in September of —not in September, in '54.

Q. So you were a full colonel when this cable break occurred on March 21, 1955, were you?

A. Yes, sir.

Q. Now, in your experience in the Army have you had any particular experience which makes you a good judge of distances?

A. I spent several years in the Field Artillery of the National Guard, and we had to judge distance there.

Q. You used instruments on those occasions, though, didn't you?

A. We used instruments and also your head.

Q. So you are specially qualified in making observations as to distances, are you?

A. No, I wouldn't say specially qualified.

Q. Now, the Federal Office Building is located on First Avenue, is it not?

A. Yes, sir. [15]

Q. Between Marion and Madison Streets?

A. Madison and Monroe, isn't it?

Q. How long have you been in the office down there?

A. Well, I came to town—you mean this last time?

Q. Yes.

A. I came to town last week, last Wednesday.

Q. Your office faces Monroe, does it?

(Testimony of George F. Rogers.)

A. No, the office I was in at that time faced Elliott Bay.

Q. It faced Elliott Bay? A. Yes, sir.

Q. Well, now, do you say that the Federal Office Building was between Marion and Monroe? Is that your recollection?

A. No, you said Marion and——

Q. I said Marion and Madison and you said no, Monroe and Madison.

A. I said I thought it was Madison and Monroe.

Q. Well, it is Madison. Now, what is the next street north of Madison on First Avenue?

A. I don't know.

Q. Isn't that Spring Street?

A. I don't know.

Q. Well, what is the second block north of Madison?

The Court: The street going alongside the north side of it?

Mr. Morrow: Yes, your Honor. [16]

A. The order in which these streets run from Madison north I do not know. The last time I was here was '55.

Q. (By Mr. Morrow): Well, how many city blocks are there between your office at the Federal Office Building and say Pier 64?

A. Is there another name for Pier 64?

Q. Pardon me?

A. What's the other name for Pier 64?

Q. The Lenora Street Dock, have you ever

(Testimony of George F. Rogers.)

heard it called the Lenora Street or the Canadian Pacific Dock?

A. The Canadian Pacific Dock, yes, I know.

Q. Yes. Well, how many blocks are there between your office we'll say and the Canadian Pacific Dock? A. I'd say about four blocks.

Q. About four blocks. Now, you said you were a good judge of distance. What is——

A. No, I didn't.

Q. Pardon me?

A. No, I didn't.

Q. Well, we'll strike that, then. We'll strike what I said. What was your estimate of the distance between your office in the Federal Office Building and the Canadian Pacific Dock?

A. Oh, I'd say approximately 500 yards, 400 yards.

Q. 400 yards. That would be 1200 feet, wouldn't it? [17] A. That's right.

Q. Now, what is your estimate of the distance between your office——

A. This would be—let me—this would be a farther distance than four—that's a short distance, I think, 400 yards. It's a greater distance than that to the CPR dock.

Q. You say it is a greater distance?

A. Yes.

Q. Well, now, you were talking about——

A. We can determine that off of a chart with no trouble at all.

Q. We're talking about your observations. I

(Testimony of George F. Rogers.)

understand your testimony was that you could see the Canadian Pacific dock and the difficulties the Princess Louise was having getting in there on the 21st. Now, what is your estimate of the distance between your office at the Federal Office Building and the Canadian Pacific dock? You have said 400 once. Now do you——

A. Well, but I corrected it and said that it was a greater distance than that.

Q. Now, according to your observation only at that time what would you estimate the distance to be?

A. Now I'm strictly guessing. To estimate a distance you must be able to look at the distance, which I can't do [18] at this time, but I would say it's approximately about 600 yards.

Q. 600 yards or 1800 feet?

A. And this is strictly a guess from memory.

Q. Well, now, what is your estimate of the distance between your office in the Federal Office Building as you saw it at that time and Pier 57 where you said you saw the Princess Louise?

A. About 300 yards.

Q. That would be about 900 feet, is that correct?

A. (Witness nods his head.)

Q. Now, is that strictly a guess, too, the same as your testimony in respect to the CPR dock?

A. Yes, talking from memory that's my opinion, it's about that far out there.

Q. Well, is that just a guess?

A. Yes, an estimate, a guess.

(Testimony of George F. Rogers.)

Q. All right. Now, you said I believe in your testimony on direct that you observed the Princess Louise approximately two or three ship lengths or approximately 600 feet off the end of Pier 57. Am I correct in restating your testimony?

A. I believe I said she come back from her own pier about two ship lengths, didn't I?

Q. Well, all right—— [19]

A. Two or three, I said.

Q. Is it your testimony then that when the Princess Louise was docking and attempting to make her first landing that she backed down to Pier 57 and passed over the cable area, the marked cable area at Pier 57? Is that what you observed?

A. I observed the Princess Louise leave her dock and come back over our cable area.

Q. Yes. Well, she backed up two ship lengths, is that your testimony?

A. I said she was approximately two or three ship lengths from her dock back into our area, yes.

Q. Well, how far did you observe the Princess Louise back up?

A. I don't know how far she backed up. I can tell you this: She backed up into our area.

Q. Well, you observed her, you say?

A. At that time I knew where our area was. I was—this window looked down there. I'd been here a long time and I knew where our cables run.

Q. Well, I understand that, but on direct examination you were stating what your observations were and that's all I want, Colonel.

(Testimony of George F. Rogers.)

A. Well, my observations were that she backed back and hooked our cable. [20]

Q. Now, how far did she back?

A. She backed back into our cable area.

Q. Well, in terms of yards or feet?

A. The exact distance she backed in yards or feet I would be unable to tell you.

Q. At one time you indicated it was two ship lengths. Is that your best estimate?

A. I said she came back two to three ship lengths.

Q. Two or three ship lengths?

A. That puts her back in—back over in our area.

Q. I see. Now, when you first observed the Princess Louise backing—

The Court: At this time we will take a short recess, about ten minutes.

(Short recess.)

The Court: You may proceed. All are present.

Q. (By Mr. Morrow): Where was the Princess Louise, Colonel Rogers, when you first observed her starting to back?

A. Down next to her own dock, the CPR dock.

Q. I see. Now, what was the fore and aft line of the ship in respect to her own dock when you observed the Princess Louise start to back?

A. I haven't the least idea.

Q. As a matter of fact didn't you see the broad-side of the ship from the angle you observed her from your office in [21] the Federal Office Building?

(Testimony of George F. Rogers.)

A. From the office you don't get a full broadside, you get somewhat of an angle. You don't get a broadside of the ship until she comes out and turns.

Q. Your testimony is you can't tell us what angle you saw the ship at?

A. I saw her first relatively parallel to her dock, then she backed up and swung over over our area.

Q. She backed in what direction, would you say?

A. Generally towards West Seattle.

Q. Would that be southerly?

A. That would be southwest.

Q. Southwest? A. Or south-southwest.

Q. Now, what else did you observe? Did you observe anything else?

A. She eventually got docked.

Q. What was the Princess Louise doing at the time when you saw that her anchor was dragging? Was she backing? A. Yes.

Q. Now, if I understand your testimony, you concluded that the anchor of the Princess Louise had fouled the Fort Lawton-Seattle cable. Is that correct? A. That is correct.

Q. And is it also correct that at that time she was backing? [22]

A. I don't know whether she fouled the anchor backing or going ahead. My conclusion was that we had a cable in that area and we had a ship over it with the anchor out and this means trouble.

(Testimony of George F. Rogers.)

Now, I don't know whether she caught it going forward or back.

Q. Well, your testimony, if I have made my notes correctly, was this, and I would like to ask you a question about it: She backed down over the cable area and had her anchor dragging at that time?

A. That's correct.

Q. Is that correct?

A. That's correct.

Q. It was then that you concluded, was it not, that there was a possibility of trouble with the Seattle-Fort Lawton cable?

A. That is correct.

Q. Now, what anchor did you observe?

A. Well, so there'll be no doubt of it I'll say the right anchor looking forward. I think that's the starboard anchor.

The Court: Was it the forward——

A. The forward anchor on the right-hand side.

The Court: The forward anchor, not the stern anchor, is that correct?

A. That's my opinion from my recollection. [23]

Q. (By Mr. Morrow): Did the Princess Louise have any assistance in docking?

A. There was a tug. A tug come up and assisted her to come into the dock, yes, sir.

Q. And where was the Princess Louise when the tug put a line aboard the Princess Louise?

A. I don't recall if the tug put a line aboard her or pushed her.

Q. What was the position of the tug in respect

(Testimony of George F. Rogers.)

to the Princess Louise when you observed the tug and the Princess Louise?

A. I don't recall what the position of the tug was. The tug's position changes when they're moving ships.

Q. Would you just describe now again everything you observed, particularly in respect to the course that the Princess Louise took until she docked while she was under your observation?

A. The Princess Louise when I first saw her was up at the CPR dock attempting to dock and in my opinion she was in trouble, and she come and moved back over our cable area. She got the assistance of a tug and come back up and docked.

Q. Now, how far west did the Princess Louise go from the end of Pier 57?

A. By inches or feet or yards I would be unable to tell you. [24] She was over our cable area.

Q. All right. How far off Pier 57 did you observe the Princess Louise, the furthest position off?

A. Any figure I give you of this would be meaningless because I would just be guessing. She was off the end of the pier close enough where I could see her very plainly.

Q. You can't state the distance the Princess Louise was off Pier 57, can you?

A. This many years after I saw her out there, it would be ridiculous for me to try to say exactly how far she was off the pier. It would be just a guess and not even an educated guess.

Q. Can you state how far the Princess Louise

(Testimony of George F. Rogers.)

was off from the sea wall at the foot of University Street?

A. I can't see the sea wall from my window, I don't believe. All you can see is the top of the piers and the docks along there.

Q. At the time in question, Colonel Rogers, where were the marks of the cable area on the chart? A. On the chart?

Q. Yes.

A. They're drawn in red ink out into the area. There's a rectangular square or rectangular figure drawn out there that's the cable area. [25]

Q. How far out from the sea wall at the foot of University Street does the marked area go?

A. I don't know.

Q. Or did it go? A. I don't know.

Q. You don't know? A. No.

Q. Did you know at that time how far the marked area extended from the sea wall?

A. I don't pay any attention to charts. I know how far out in the bay it runs. I could go up in the window and it goes out so far off of the pier.

Q. How far out from the sea wall did the Fort Lawton cable extend in a generally westerly direction on the 21st of March, 1955?

A. The exact location of the cable, this I couldn't tell you. Captain Bowen can tell you. I know generally where it runs.

Q. Well, I understood you to say, Colonel Rogers, that you knew how far out it ran.

A. I know the general route the cable takes, I

(Testimony of George F. Rogers.)

know the general area, and this ship was in our area.

Q. Did you assume at that time, Colonel Rogers, that the Fort Lawton-Seattle cable extended out more or less in line with Pier 57? That would be perpendicular to the sea wall. [26]

A. Now this I couldn't answer. The cable runs down alongside the pier and swings out towards Fort Lawton. Now, when you start talking perpendicular to sea walls or not, I can't answer that.

Q. What you referred to when you referred to the ship dragging the cable was the actual cable area marked on the chart, was it not?

A. No, I was referring to the area out off of the pier that our cable run in. Now, there's an area out there and it's marked on the chart also. The actual coordinates on the chart, I don't know what they are, but there's an area off of the pier that our cable runs through.

Q. Well, there is a northerly boundary of the marked cable area, is there not?

A. Yes, there is, and it's marked on the chart.

Q. Now, where is that northerly boundary in respect to Pier 57, if you know?

A. The north boundary. Well, I'm trying to get straight on what's north and south, because things sometimes are catty corner. Do you mean the right-hand boundary? Are you talking about the north boundary, the right-hand boundary or the in boundary?

Mr. Broz: Your Honor, I wish to object. [27]

(Testimony of George F. Rogers.)

The examination is beyond the scope of the direct examination.

The Court: The objection is overruled.

A. I can show you on the chart where the cable area is.

Q. (By Mr. Morrow): Colonel Rogers,—

A. O. K.

Q. Are you unfamiliar with the north, west, east, south directions in respect to this area?

A. I know generally north, south, east and west, but you get into individual piers and you get things on a curve and they sit catty corner. Now, I can tell you which is the right boundary and the left boundary of the cable area, and it goes straight out. Now, Pier 57 runs generally towards West Seattle. It's in a westerly direction. Then the north would be on the right and the south would be on the left.

Mr. Morrow: I have no further questions.

The Court: Anything further?

Redirect Examination

Q. (By Mr. Broz): Colonel Rogers, you stated on cross examination that you attended West Point? A. That is correct.

Q. How long were you at West Point? [28]

A. One year, sir.

Q. You did not graduate from West Point?

A. No, sir.

Q. When and where did you get your commission?

(Testimony of George F. Rogers.)

A. I was commissioned in the National Guard, then when war was declared I was commissioned and after the war I was given a regular Army commission.

Q. How long has it been since you have been stationed in Seattle?

A. I left here September, 1955.

Q. On what side of the Federal Office Building is your office?

A. On the side towards Elliott Bay.

Q. That's the——

A. That would be the northwest corner.

Q. That was where your office was in 1955?

A. That's correct.

Q. Is this the office from which you observed the occurrence which you have testified to?

A. That's correct.

Q. Did you have a clear view of the area off Pier 57?

A. A clear, unrestricted view.

Q. Did you have a clear view of the area off Pier 64?

A. Yes.

Q. Can you estimate—— [29]

A. There's two windows involved here. You look at 64 out of one window and 57 out the other.

Q. Can you estimate how far off Pier 57 the Canadian Pacific vessel was in terms of ship lengths?

A. Well, distances over this time is strictly a guess. I would say, though, that two to three ship lengths she was out there.

(Testimony of George F. Rogers.)

Q. Would you say that she was any further out than three ship lengths?

A. I don't think so, because she looked awful close.

Q. This is to the best of your recollection?

A. That's to the best of my knowledge.

Q. Do you recall any of the details of the maneuvering of the vessel at the time that you observed her?

A. Well, I didn't watch her continuous. I'd look at her and go back to work and look some more.

Q. Would it be correct to say that your recollection is only a general recollection?

A. Well, I'll say this: As far as the fact that she tried to dock and didn't make it and was in trouble and come back over our area and then come up and docked, that's not general, that's an absolute fact.

Mr. Broz: I have no further questions. [30]

Recross Examination

Q. (By Mr. Morrow): Colonel Rogers, you have a distinct recollection of making the observations which you have just testified to, would you say?

A. This is correct.

Q. What is your estimate of the length of the Princess Louise?

A. The captain said three hundred and some feet.

Q. Well, I know he said that, but what is your recollection?

(Testimony of George F. Rogers.)

A. Well, that would be my recollection.

Q. That's your recollection. Well, now, when you referred to ship lengths in giving the distance off the piers did you have in mind the captain's testimony of 307 feet?

A. When I said ship lengths I had in mind the length of the Princess herself. Now, again with a ship moving on the water there and I'm not a seafaring man, it's pretty hard to recollect that, but as I recall it she moved back about three lengths.

Q. That was back?

A. From off the end of the pier, that was the distance.

Q. Colonel Rogers, you seem to have a most distinct recollection of this backing operation. How long in terms of minutes did you keep the Princess Louise under observation? [31]

A. Oh, I don't know, I'd guess that it was about maybe between a half hour and an hour.

Q. Between a half hour and an hour?

A. Now this is strictly a guess. I'd say between a half hour and one hour.

Q. Now you're referring to——

A. From the first time I saw her until she got tied up.

Q. Yes, but that wasn't quite the question, Colonel Rogers. The question is how many minutes did you keep the Princess Louise under observation during this half hour to an hour?

A. I haven't the least idea. I'd look out one

(Testimony of George F. Rogers.)

window and go back to work, look out the other window and go back to work.

Q. So you didn't keep her under constant observation? A. No, sir.

Q. Did you continue to perform the duties in your office in respect to your work at the same time that this docking operation was going on?

A. I did.

Q. So you only saw the Princess Louise at moments and then you would go back to your work and then come back and look at it again, would you?

A. However, the most of the time during that time I would watch her because it was interesting to watch. [32]

Q. I see. Well, now, if it took approximately an hour to dock, were you at the window watching her most of the time during that hour?

A. There are two windows involved. I'd have to walk into one room to see the CPR dock, the other window I could see right from my desk.

Q. And were you doing that all the time?

A. Yes.

Q. Going back and forth for an hour?

A. Yes, I did that because I'd take papers back and forth sometimes to talk to a person in that office, sometimes in the other.

Q. Well, I get the impression, Colonel Rogers, that you primarily kept at the work you were sup-

(Testimony of George F. Rogers.)

posed to be doing at that time and that you made casual observations of the Princess Louise's maneuvers. Is that correct?

A. Well, I think you have maybe the wrong impression, because my work is strictly supervisory, I don't have a lot of papers to shuffle, and I spent a good time watching the ship. It was something interesting to watch. I didn't have a great deal to do as far as shuffling papers is concerned at that time.

Mr. Morrow: That's all. [33]

Redirect Examination

Q. (By Mr. Broz): Colonel, were you concerned with the cable?

A. I was considerably concerned with the cable, because that took care of our lines out to Lawton, and if we lost the cable we're going to be in trouble, and at this time this is of a primary interest.

Mr. Broz: That's all.

The Court: Did you intend to say that from the time you saw the ship in what you have said was in trouble in docking about an hour elapsed before her docking operation was completed?

A. Well, your Honor, as I told Mr. Morrow, I was strictly guessing. He asked how long and I said between a half hour and an hour.

The Court: You may proceed.

Mr. Broz: I have no further questions.

Mr. Morrow: I have one or two questions.

(Testimony of George F. Rogers.)

Recross Examination

Q. (By Mr. Morrow): Colonel Rogers, you indicated that you were concerned about damage to the Fort Lawton cable on this occasion. Did you notify the cable ship? A. No, sir. [34]

Q. Well, that would normally have been your duty, wouldn't it? A. No, it was not.

Q. Whose duty would that be?

A. That would be in the plant department, Lieutenant Colonel Bingle or some of his people.

Q. Did you alert the plant department?

A. I did.

Q. Do you know what they did?

A. They would—I presume at that time they would get ahold of Captain Bowen and alert him to the possible need for the vessel. They then in conjunction with the traffic department would determine what we were going to do if we lost the cable to back it up, and they would then start getting ready to either repair it or enter into a decision not to repair it.

Mr. Morrow: That's all.

Redirect Examination

Q. (By Mr. Broz): Colonel, will you explain what you mean by "back up"?

A. Well, this cable carried the circuits from the Federal Building up to the Fort Lawton transmitters. If the cable is interrupted, then we have to put some type of communication up to substitute

(Testimony of George F. Rogers.)

for it, and this we took [35] care of by leased lines from the P T & T Telephone Company.

Mr. Broz: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Mikkeltorg: The libellant will call Master Sergeant Archie Zehe.

The Court: Come forward and be sworn as a witness.

ARCHIE ZEHE

called as a witness in behalf of libellant, being first duly sworn, was examined and testified as follows:

The Court: Your last name is what?

A. Zehe.

The Court: How do you spell it?

A. Z-e-h-e.

The Court: And it is Sergeant, is it?

A. Master Sergeant.

The Court: You may inquire.

Direct Examination

Q. (By Mr. Mikkeltorg): Sergeant, would you speak loud enough so that you can [36] easily be heard and state your address?

A. My address presently is Box 496, Kodiak, Alaska.

The Clerk: Can I have his name, please?

Q. (By Mr. Mikkeltorg): Will you spell your name

(Testimony of Archie Zehe.)

The Court: Master Sergeant Zehe, Z-e-h-e, and Archie is spelled A-r-c-h-i-e, is it?

A. Yes, sir.

The Court: You may proceed.

Q. (By Mr. Mikkelborg): Would you state your present occupation, Sergeant?

A. Station commander, United States Army, Alaska Communication System station, Kodiak, Alaska.

Q. How long have you held that position?

A. I've held this position since June 4, 1957.

Q. And what position did you hold prior to that position?

A. Noncommissioned officer in charge of the traffic section.

Q. At what place?

A. At Kodiak, Alaska, the same station.

Q. Is that the Alaska Communication System station? A. Yes.

The Court: What do you call that assignment? Will you just state it again, the nature of your job, the classification of your job? You are now in charge of what or you now are what?

A. I am now the station commander of the [37] U. S. Army Alaska Communication System station, Kodiak.

The Court: You may proceed.

Q. (By Mr. Mikkelborg): And your former position at that same station was——

A. Noncommissioned officer in charge of the traffic section.

(Testimony of Archie Zehe.)

Q. How long did you hold that position, Sergeant?

A. From October, 1951, up to June 4, 1957.

Q. Would you describe the duties of your position as the noncommissioned officer in charge of the traffic section for the Kodiak Alaska Communication's station?

A. My duties at that time in that job were overall supervision of all operational personnel and circuits, maintaining and proper supervision of station logs to ascertain that all interruptions, anything peculiar to communications and traffic would be entered in the log at that time. I made not less than hourly checks to ascertain that communications were intact and traffic was moving.

Q. Would you describe the duties of your now position as station commander of the Alaska Communication System station at Kodiak?

A. My duties now are overall supervision and administration of the station, which includes all phases.

Q. What were your duties in March of 1955?

A. NCOIC the traffic section. [38]

The Court: Wait just a minute. Spell out the names of those abbreviations.

A. Excuse me, sir. Noncommissioned officer in charge of the traffic section.

Q. (By Mr. Mikkelsen): And you have described those duties, have you not?

A. Yes, sir.

(Testimony of Archie Zehe.)

Q. At my request did you bring with you the station log? A. Yes, sir, I did.

Mr. Mikkeltborg: I ask that the log which the witness has be marked as Libelant's Exhibit 1 for identification.

The Clerk: Libelant's Exhibit 1.

The Witness: I'm unable to surrender these documents, sir. Only the Secretary of the Army can surrender them. I'm custodian of them.

Q. (By Mr. Mikkeltborg): Do you have with you the original log?

A. Yes, sir, I do.

Q. Do you have with you a copy of that log?

A. I have copies of them, sir.

Mr. Mikkeltborg: If the Court please, we ask that after examination by Counsel a copy may be substituted for the original to permit this officer to return the original back. [39]

The Court: Let the copy be marked Libelant's Exhibit 1 and let the original with the copy be shown to opposing Counsel after I have seen it.

(Copy of Alaska Communication System Kodiak station log was marked Libelant's Exhibit No. 1 for identification.)

Q. (By Mr. Mikkeltborg): Will you please examine what has now been marked for identification as Libelant's Exhibit 1. Do you recognize that?

A. Yes, sir.

Q. What is it?

A. It is an exact true copy of the original sta-

(Testimony of Archie Zehe.)

tion log of the Kodiak radiotelephone section, Kodiak, Alaska, the ACS station.

Q. Does that record cover the month of March, 1955? A. Yes, sir, it does.

Q. Is that a record of the Alaska Communication System or is that a personal record, Sergeant?

A. That is an official document, record of the Alaska Communication System station, Kodiak, Alaska.

Q. Is that the type of record which the Alaska Communication System station under your command in Kodiak is required to keep in the regular course of the business of that particular station?

A. Yes, sir, it was then and is now. [40]

Q. Was that particular record kept in the regular course of the business of the Kodiak ACS station? A. Yes, sir, it was.

Q. Where did that record come from before its appearance here, if you know?

A. I brought that record with me from Kodiak, Alaska, this Sunday from the station files of Kodiak, Alaska, which I am custodian of. I am——

Mr. Morrow: I have no objection to the authenticity or the substitution of the copy for the original.

The Court: I understand it was admitted in the pretrial order, was it not?

Mr. Morrow: No, your Honor. I had not previously seen it.

The Court: It is not one of those marked for identification?

(Testimony of Archie Zehe.)

Mr. Morrow: No, your Honor.

The Court: Then he having no objection do you wish to offer it?

Mr. Mikkelborg: I wish to offer it, your Honor.

The Court: Do you have any objection to using the copy?

Mr. Morrow: I reserve the objection as to the materiality. I only admit the authenticity. [41]

The Court: I understand so. Have you any objection to the fact of its being a copy instead of the original?

Mr. Morrow: No.

The Court: And on what issue do you offer this?

Mr. Mikkelborg: We offer this exhibit, your Honor, in connection with the establishment through this witness and that record kept by him of the interruption in service of the cable facility between Seattle and Kodiak.

The Court: It has not been shown that it has anything to do with that kind of a record. At least it has not been sufficiently shown against the objection.

Mr. Mikkelborg: The witness testified in connection with the description of it that it is a record kept of all the traffic which he receives at that station from Seattle showing entries per hour or by the hour.

The Court: You ought to ask him concerning the subject matter including the subject matter of this litigation as to the contents and nature of the contents of the exhibit.

(Testimony of Archie Zehe.)

Q. (By Mr. Mikkeltorg): Sergeant, directing your——

Mr. Mikkeltorg: I understand this has not [42] been admitted. It that correct?

The Court: It has not been admitted, and what the Court is directing your attention to is that you now have the opportunity of showing that the nature of the contents on a certain day or certain days of this record pertain to subjects of this litigation's inquiry.

Q. (By Mr. Mikkeltorg): Sergeant, from your familiarity——

The Court: Without telling him what the specific entry is.

Q. (By Mr. Mikkeltorg): Sergeant, does this record cover the date of March 21, 1955?

A. This record covers the date of March 21, 1955, of the radiotelephone communications between the U. S. Army Alaska Communication System station, Seattle, Washington, and the U. S. Army Alaska Communication, Kodiak, Alaska.

Q. Does it in a general nature show whether or not there were any communications——

The Court: Regarding what subjects of communication. That would be one way of asking him, regarding what subjects of communication on that date, March 21, 1955.

Q. (By Mr. Mikkeltorg): Regarding what subjects, Sergeant, of communications on that date does this record contain any information?

A. By "subjects" I presume you mean the cir-

(Testimony of Archie Zehe.)

uits and the [43] circuit that this document covers the operational——

The Court: I do not think so. I do not think that is what he is inquiring about. At least that is not what the Court is interested in. The question is, what are the subjects of the various communications, if any, you had on that day between your Kodiak office as reflected by this exhibit and the Seattle office of the Communication System.

A. Well,——

The Court: That is the nature of the inquiry.

A. It will indicate that I had an interruption in service on March 21st at approximately 4:00 p.m. Seattle time, at 4:00 p.m. Seattle time.

Q. (By Mr. Mikkelborg): Does it contain entries concerning the traffic handled between your station and Seattle during the day of March 21st?

A. Yes, sir, it will, it does.

Q. Does it show the general nature or the type of communications that were held, their frequency, and items such as that?

A. Yes, sir, it will.

Mr. Mikkelborg: I think that should establish a sufficient foundation to offer Libelant's Exhibit 1.

Mr. Morrow: I object to the materiality and relevancy on the basis that it isn't shown that this [44] log is either material or relevant as showing a time when the Seattle-Fort Lawton cable went out. Obviously there are many different connections, I would assume, between Fort Lawton and Kodiak, Alaska.

(Testimony of Archie Zehe.)

The Court: With respect to the time element what is there material about this exhibit according to the contention of the one offering it?

Mr. Mikkelborg: With respect to the time element the contention of the libelant, as I believe is borne out by the testimony of this witness, is that this record will show regular entries to the effect that traffic communications by the radiotelephone system were had between the station commanded by this officer and the Seattle station and will show the times of those communications and will show the interruption of those communications.

The Court: You mean will show the time when it was interrupted?

Mr. Mikkelborg: Yes, your Honor.

The Court: Do you seek by this document or some other evidence to tie that up as a material fact in this litigation?

Mr. Mikkelborg: We seek to show by this document that the interruption of the facility—first that the facility was in use and that the interruption [45] coincides with the time in which the Princess Louise was maneuvering over the cable area.

The Court: Is it charged that this took place at a particular time so far as the libel is concerned, or as far as the contentions of the libelant are concerned in this pretrial order?

Mr. Mikkelborg: The pretrial order could only—agreement on the pretrial order could only be reached as to the day.

The Court: It supersedes the pleadings; I take

(Testimony of Archie Zehe.)

occasion to remind you of that. We have no pleadings in the case, we have the pretrial order. What is there in the pretrial order that makes this material as to time?

Mr. Mikkelsen: The pretrial order specifies, or it is agreed in the pretrial order that the break in the Seattle-Fort Lawton cable occurred during the week of March 20th. That was as close as Counsel could agree. The evidence will show the exact time of the break.

The Court: Will you seek to show from this document the failure of this system or this cable somewhere on the line during that week?

Mr. Mikkelsen: Yes, your Honor.

The Court: And specifically when it was?

Mr. Mikkelsen: Yes, your Honor.

The Court: The objection is overruled. [46] As a little bit, I suppose, of the caution that a trial judge feels he must take, in the past I have always been reluctant after about the first half dozen trials we conducted to excuse witnesses until the trial is over because so many times either Counsel may wish to call one, and here again I have been reluctant in my experience with the pretrial procedure to let the order be approved with in it a statement that it entirely supersedes the pleadings, and here is a good example. I assume you have in the original pleading an allegation that is reasonably definite and certain as to the time when this cable failed. Now you have instead of that, if you had anything of that sort, a very unhelpful con-

(Testimony of Archie Zehe.)

tention or statement that the cable failure occurred during one week in 1955.

Mr. Mikkeltorg: That is true, your Honor.

The Court: You might prove it occurred in one week and you still would not have proved anything definite.

Mr. Mikkeltorg: That is true, your Honor.

The Court: You may proceed.

Q. (By Mr. Mikkeltorg): Sergeant, directing your attention to the Alaska Communication System station at Kodiak log entry for March 21st in terms of Kodiak local time, what does the record show with relation to that date, [47] if anything?

A. Do you want Kodiak local time instead of Seattle time?

Q. The afternoon of the 21st of March, Kodiak local time.

The Court: The Court has not admitted the document in evidence, the Court has merely ruled on the objection.

Mr. Mikkeltorg: If the Court please, we wish to offer this exhibit in evidence. I thought I had offered it.

The Court: Is there a further objection?

Mr. Morrow: Yes, the same objection, your Honor. I think it isn't tied up yet.

The Court: The objection is overruled. This exhibit is now admitted, it being Libellant's Exhibit 1.

(Libellant's Exhibit No. 1 for identification was admitted in evidence.)

(Testimony of Archie Zehe.)

The Court: Counsel conducting the examination and being responsible for the offer and admission in evidence of exhibits should keep track of them and have in mind the state of the record respecting the admission or nonadmission of exhibits. Proceed.

Mr. Mikkelborg: Thank you, your Honor.

Q. (By Mr. Mikkelborg): Sergeant, directing your attention to the Alaska Communication System station, Kodiak, log book, does that record have any entries in terms of [48] Kodiak local time or Seattle local time for the afternoon of March 21, 1955?

A. The entries are in Greenwich mean time. Converted to Kodiak local time there are entries.

Q. Very well. How often are there entries made on that date?

A. Not less than once hourly.

Q. Are there any entries of March 21st relating to communications with the Alaska Communication System station in Seattle?

A. Yes, sir. At 12:00 noon Kodiak local time I——

Q. Sergeant, before you proceed any further, to clarify the matter of time, what time is 12:00 noon Kodiak local time in terms of Seattle time?

A. That would be 2:00 p.m. Seattle time. Kodiak is two hours behind Seattle.

Q. Very well. What entry is shown for that time in the ACS log for the Kodiak station?

A. The operator's initials who was on duty at that time, and her remarks that contact was made

(Testimony of Archie Zehe.)

with AAH, Seattle, on twelve and thirteen thousand kilocycles. The signals were good both ways and we were up to long distance for traffic.

The next entry at 1:00 p.m. Kodiak time, which is 3:00 p.m. Seattle time—— [49]

The Court: As soon as you can find a place to pause, will you do so?

A. Yes, sir.

The Court: Court is now at recess until 2:00 o'clock.

(Thereupon, at 12:15 o'clock p.m. a recess herein was taken until 2:00 o'clock p.m.)

Tuesday, August 19, 1958, 2:15 o'clock p.m.

(All parties present as before.)

The Court: You may resume the trial. Proceed. All are present.

ARCHIE ZEHE

resumed the stand.

Direct Examination—(Continued)

Q. (By Mr. Mikkelsen): Sergeant, directing your attention to what has been marked Libellant's Exhibit 1 for identification, namely the Alaska Communication System station log for the Kodiak station, can you state whether or not the record shows any record of traffic with ACS Seattle for the date of March 21, 1955? [50]

A. Yes, sir, the log shows that traffic had been handled through the day.

Q. What does it show with respect to that traffic during the day?

(Testimony of Archie Zehe.)

A. It shows the traffic conditions, that the traffic was light. All entries as I had stated before.

Q. Is there any routine entry made at any particular time with relation to the traffic with Seattle?

A. At 3:00 p.m. Seattle time——

Q. Just a moment, Sergeant. Is there an entry for say beginning with noon regarding Seattle?

A. Yes, sir, beginning at noon.

Q. On what date?

A. On the 21st of March.

Q. What is that entry?

A. That—let's see, I've got to decipher it.

Q. How often were these entries made?

A. Every hour, so beginning at noon, which is 2000 Greenwich time, noon Seattle time, we show in the entry going ahead with AAH on twelve and thirteen thousand, signals were good both ways and traffic light.

Q. What is AAH, Sergeant?

A. AAH is the radio call signal, the radio call sign of the Alaska Communication System, Seattle, Washington.

Q. And what does the record show with respect to traffic? [51]

The Court: Is there any objection to his marking that place on the margin of that exhibit right opposite the beginning of that notation?

Mr. Mikkelsen: That's agreeable, your Honor.

(Witness marks on Libellant's Exhibit No. 1.)

The Court: You may proceed.

(Testimony of Archie Zehe.)

Mr. Mikkelborg: I ask that the reporter read the portion of the——

The Court: That will be done.

(The reporter read the last question.)

Q. (By Mr. Mikkelborg): And what hour was that entry made, Sergeant, in terms of Seattle time?

A. 12:00 noon.

Q. And did you make a mark at that position?

A. Yes, sir, I have.

Q. What is the next regular entry with respect to any traffic with ACS, Seattle?

A. The next entry would be at 1:00 p.m. Seattle time the log shows we cleared AAH on twelve and thirteen thousand, signals were fair to good all schedules, traffic was light.

Mr. Mikkelborg: If the Court please, I ask that the witness be permitted to mark that rather than with just a check mark, but to mark it with the time in [52] terms of Seattle time.

The Court: Any objection from opposing Counsel?

Mr. Morrow: Well, I have no objection, but I do have this observation: The witness has indicated that 12:00 noon was Kodiak local time.

The Witness: No, sir.

The Court: No, he does not agree with that, Mr. Morrow. You said, "No, sir," in response to Mr. Morrow's remark? A. Yes, sir.

Mr. Morrow: Well, may I see the mark on his exhibit?

(Testimony of Archie Zehe.)

(Libelant's Exhibit No. 1 was handed to Mr. Morrow.)

Mr. Mikkelborg: If the Court please, I ask the Court's indulgence to excuse Mr. Broz for a few minutes to assemble the libelant's memorandum.

The Court: Mr. Broz may do that.

Mr. Broz: Thank you, your Honor.

(Libelant's Exhibit No. 1 was returned to the witness.)

The Court: Does that page have a number?

A. Yes, sir.

The Court: What is the number?

A. 79. [53]

The Court: So this marked margin calling attention to these two entries in this exhibit appear on that page just stated by you, is that right?

A. Yes, sir.

Q. (By Mr. Mikkelborg): What page was that, Sergeant? A. Page 79.

Q. What does the next entry with respect to any traffic with Seattle show and at what time?

A. At 2:00 p.m. Seattle time we contacted AAH on twelve and thirteen thousand. Signals were good both ways, we were up to long distance for traffic.

Q. And will you mark that with the Seattle time opposite the Greenwich time in the margin, and would you state for the record what the Greenwich time is opposite the mark you are now making? Will you state what the Greenwich time opposite that mark is?

(Testimony of Archie Zehe.)

A. The Greenwich time shown opposite that mark, 2200 Zebra.

Q. Would you read the next——

The Court: What does that mean, 2200 Zebra?

A. Greenwich time.

The Court: What does "Zebra" mean?

A. That——

Mr. Mikkelborg: If the Court please, that is the military——

The Court: Just a minute. What does that mean? [54]

A. That is the symbol to indicate Greenwich time.

The Court: In other words, if you see the word "Zebra" you understand that refers to Greenwich time, is that what you mean?

A. Yes, sir, in communications I do, sir.

The Court: You may proceed.

Q. (By Mr. Mikkelborg): Would you read the next entry pertaining to Seattle and state at what hour it appears?

A. At 3:00 p.m. Seattle time the log shows clearing AAH twelve and thirteen thousand, signals good all schedules, traffic light.

Mr. Morrow: May the Court please, in order that I might follow this I wonder if he could refer to the entry in the exhibit first in respect to Greenwich time in order that I might identify it?

The Court: If that will help you, will you do that? A. Yes, sir.

The Court: The Court asks the witness to do so.

(Testimony of Archie Zehe.)

A. All right. Do you want the last one?

Q. (By Mr. Mikkeltorg): Would you state the Greenwich time symbol at that entry?

A. The symbol at that entry, 2300 Zebra. [55]

The Court: I am afraid you used a word that——

A. 2300 Greenwich.

The Court: No, no. Mr. Reporter, did you get down the first word of his last answer?

The Reporter: Yes, sir.

The Court: State it.

(The reporter read the answer as follows:

“A. The symbol at that entry, 2300 Zebra.”)

The Court: Proceed.

Q. (By Mr. Mikkeltorg): Now, Sergeant, what is the next scheduled contact with Seattle according to the record as you have it there following the contact at 3:00 p.m. Seattle time, which is listed there opposite 2300 Greenwich time? What is the next——

A. Is that the one you want, the one after, following?

Q. The next scheduled contact with Seattle.

A. It would be on Page 80.

Q. At what time was the next scheduled contact?

A. 0005 Greenwich, which is 4:05 p.m. Seattle time.

Q. What time was the next scheduled contact after 3:00 o'clock or the next regular entry would have been made if it were made at that time?

A. At 0001.

(Testimony of Archie Zehe.)

Q. Which in terms of Seattle time is what? [56]

A. It would have been 4:01 p.m.

Q. Does such an entry appear in the record?

A. No, sir, it does not.

Q. What is the next entry?

A. The next entry is at 0005 Greenwich, 4:05 p.m. Seattle time.

Q. What entry is made opposite that time?

A. The log shows that we have the AAH carrier on 13,000 but it doesn't sound as though he has cleared Adak yet.

Q. Would you explain what those symbols mean or what that language is intended to convey?

A. Yes, sir.

Q. In terms of your language used in that station and this record.

A. The radio portion of this circuit, which was from the Fort Lawton transmitter coming north to Alaska, was shared by Adak and Kodiak. On the even hour Kodiak had the circuit, on the odd hour Adak had the circuit, and this being the evening hour, the next entry, the operator could hear the carrier coming from the Fort Lawton transmitter and assumed that the circuit was sitting idle and that they hadn't cleared Adak yet.

Q. Before going any further, Sergeant, would you describe this circuit as it existed and as you used it between Alaska Communication System stations in Seattle and your Alaska [57] Communication System station in Kodiak?

A. Yes, sir. This is a wireless circuit between

(Testimony of Archie Zehe.)

Kodiak and the Fort Lawton transmitter station, which we had a transmitter there. Between——

The Court: Where? A. At Fort Lawton.

The Court: Where was it located?

A. At Fort Lawton, sir.

The Court: Was it up on top of the hill or was it down towards——

A. That I could not tell you, sir, because I've never been to the station. I know from circuit diagram and facilities charts that the equipment was there.

The Court: You may proceed.

A. And the portion between the Fort Lawton transmitter and the ACS in the Federal Building was by control lines in a submarine cable which was shown—to my knowledge was shown on a circuit diagram and facilities chart.

Q. (By Mr. Mikkelborg): The Federal Building where, Sergeant?

A. In Seattle, Washington, located on First Avenue between Marion and Madison.

Q. Does this record show any information with respect to the failure of the Seattle station to come in at 4:00 p.m. Seattle time? [58]

A. Yes, sir, there's a lack of an entry at 4:01 p.m., where Seattle would normally and invariably would contact us. They did not. At this time they hadn't made contact with us. All we could get was the radio signal from Fort Lawton.

Q. What is the next entry with respect to con-

(Testimony of Archie Zehe.)

tact with the Seattle ACS station by your Kodiak station?

A. At 0006 Greenwich, 4:06 p.m. Seattle, we advised AAH, which is ACS Seattle, via ALB, which is ACS Anchorage, we had a circuit across there, that when they were ready we would be on twelve and thirteen thousand.

Q. Well, what was the next entry in that connection?

A. At 0009 Greenwich, 4:09 p.m. Seattle, AAH—ACS Seattle—advised Kodiak via ALB—ACS Anchorage—that they have transmitter modulation trouble and to stand by. In other words, they weren't getting from the ACS in the Federal Building in Seattle to the Fort Lawton transmitter.

Q. How, if you know, was ALB, or Anchorage, able to receive anything from Seattle?

A. Well, at that time I do know that from ACS Seattle to ACS Anchorage we had leased lines, telegraph and phone, around through Canada.

Q. What is the next entry with regard to communications or the lack of them with Seattle? [59]

A. At 0020 Greenwich, 4:20 p.m. Seattle, we made contact with AAH twelve and thirteen thousand; signals good both ways, up to long distance for traffic. AAH, which is ACS Seattle, advised they had line trouble.

Q. Would you describe the technical meaning of the term used there, "line trouble," if it has any?

A. Well, line trouble could be any number of disturbances which would be a failure between the

(Testimony of Archie Zehe.)

two points on this control cable, or any control cable as far as that goes.

Q. What control cable was involved here?

A. This control cable would have had to have been between the ACS at the Federal Building and the Fort Lawton transmitter, because that was designated as the control cable for this circuit.

Q. You say would have had to have been there. Why would it necessarily have had to have been there? Why could it not have been somewhere else between Kodiak and Fort Lawton?

A. Well, I assumed it would have had to have been there, the fact that my circuit diagram and routing facilities show it there and no other way.

Q. Was there any other line in the circuit?

A. Pardon?

Q. Is there any other line in your circuit other than the line between ACS Seattle and Fort Lawton? [60]

A. No, sir, there isn't.

The Court: By "line" do you mean cable line, submarine?

A. Correct, sir.

Q. (By Mr. Mikkelsen): Is that what you mean?

A. Yes, sir.

The Court: Do I correctly understand you in hearing you say, as I thought you did, that the only submarine cable concerned in the transmission of messages between here and Kodiak, Alaska by the ACS is a relatively short cable between a point on the Seattle waterfront and the Fort Lawton transmitter station?

(Testimony of Archie Zehe.)

A. At that time, yes, sir.

The Court: That was March 21, 1955?

A. Yes, sir, Page 80.

The Court: Where is the site of the end of the cable in Elliott Bay? Where does it land, that little cable running between Fort Lawton and this waterfront here, where does it land in Elliott Bay?

A. That, sir, I—I don't know. I haven't been stationed here long enough. I could only go on Colonel Rogers' statement this morning at that pier.

The Court: Is it described with a number?

A. Yes, sir. Pier 57, I believe.

The Court: Was Pier 57 ever known by any [61] other local popular name to your knowledge?

A. Not to mine, sir. I'm not familiar with Seattle.

The Court: Proceed.

Q. (By Mr. Mikkelsen): Sergeant, referring you back to the entry opposite 0005 Greenwich time or 4:05 Seattle time, would you explain what was meant by the entry regarding the AAH carrier and the other symbols in that line?

A. Well, that carrier would have been an electronic signal emitted from the transmitter at the Fort Lawton site, the signal that could have come only from there. Any other signal such as voice would have had to have been coming from the Federal Building, the ACS location in the Federal Building here.

Q. Does that entry indicate that anything was heard on that carrier signal?

(Testimony of Archie Zehe.)

A. No, sir, it merely indicates that the carrier was on there, the circuit was idle.

Q. What kind of a condition is that? What does that indicate?

A. Well, as the entry states, the operator assumed that the Seattle end had not—either had not cleared Adak or for some unknown reason had failed to contact us, and that's why the next entry at 0006 shows that we [62] advised Seattle via Anchorage that we were waiting for them. We would have been calling from our end, calling Seattle, and requesting that they contact us. In this case they did not, so that is the reason that we show that we did make contact around through Anchorage. We as you call it passed the word through Anchorage and let them know that we were waiting for them.

Q. Were you in charge of the reception and making of these records at that time?

A. I supervised the making of these records.

Q. Do you recall whether you took any action on learning of this difficulty?

A. No, sir, I personally did not take any action on this. I checked these logs hourly. Had there been difficulty which extended to a longer period of time, then I would have personally taken action to find out just why communications had not been restored.

Q. What arrangements were made, if any, to restore communications insofar as you know?

A. That is not known to me.

(Testimony of Archie Zehe.)

Mr. Mikkelsen: You may cross examine.

Cross Examination

Q. (By Mr. Morrow): Sergeant Zehe, on Page 80 of Libellant's Exhibit 1, [63] following down from your entry of 0020 Greenwich time I notice an entry 0304 Greenwich time, "Clear AAH Seattle 12/13 signals good all sked. Traffic light." Is that when the Seattle-Fort Lawton line was cleared?

A. Well, not necessarily, sir.

Q. First of all would you interpolate that Greenwich time into Seattle time?

A. 7:04 p.m.

Q. And what date would that be?

A. That's the 21st calendar day. It would be the 22nd Greenwich.

Q. It would be March 21st Seattle time, 7:04 p.m.?

A. Yes, sir.

Q. Well, what does "Clear AAH Seattle" mean under the Seattle time of 7:04 p.m. on March 21, 1955?

A. We released the circuit. Our time was up, we released the circuit for operation to Adak, from Seattle to Adak, ACS Adak.

Q. What does "12/13" mean?

A. That's the frequencies, the transmitting and receiving frequencies, 12,000 being ours, thirteen being Seattle's.

Q. And what does the rest of the entry mean under the 0304 Greenwich time, which is 7:04 p.m. Seattle time, on March 21st?

(Testimony of Archie Zehe.)

A. It indicates that the radio signals were good for that [64] schedule and the traffic was light.

Q. Does "AAH" stand for the Seattle sign or call number of the Alaska Communication System?

A. It is the radio call sign of the Alaska Communication System station in Seattle.

Q. So that the entry that you have there with respect to 7:04 p.m. Seattle time March 21st is quite similar, is it not, to the signal you had at 2100 Greenwich time on Page 79 of the exhibit?

A. Yes, sir.

Q. Now, in connection with 2100 Greenwich time which you indicated to be 1:00 p.m. Seattle time, you concluded, I believe, in your testimony that the line between Seattle and Fort Lawton, that is the submarine cable, was working, isn't that correct?

A. Yes.

Q. You were getting through?

A. Yes, sir.

Q. Now, it's true then, is it not, that approximately the same entry for 7:04 p.m. March 21st under the entry of 0304 Greenwich time on Page 80 of the exhibit likewise indicates that the Fort Lawton and the Seattle line had been restored?

A. Well, service had been restored.

The Court: Is that 1:00 p.m. of the same day?

Mr. Morrow: No, 7:04 p.m.

The Witness: 7:04 p.m. now, your Honor, he's referring to.

Q. (By Mr. Morrow): Well, in your direct testimony you indicated that the service was in good

(Testimony of Archie Zehe.)

operation at 1:00 p.m., 2:00 p.m. and 3:00 p.m. on March 21, 1955, did you not? A. Yes, sir.

Q. Referring to Seattle times. And you concluded that at 4:05 p.m. there was an interruption of service, did you not?

A. We hadn't made our contact yet. I assumed that there was an interruption.

Q. Well, actually you had concluded that there was no entry at 0001 Greenwich time, Page 80 of the exhibit, and from that lack of entry you concluded that there was no service, isn't that correct?

A. That is correct, sir.

Q. Yes. Now,—

The Court: Cannot Counsel stipulate there was no service on the line at such and such times?

Mr. Mikkelsen: The libelant will certainly stipulate that service was interrupted between 3:00 p.m. and 4:00 p.m. when Seattle failed to come through.

The Court: Whatever the cause it would seem [66] that you ought to be able to—

Mr. Morrow: Well, from these entries, your Honor, it appears that there was an interruption of service at 4:05 p.m. Seattle time, that at 4:20 p.m. they had line trouble from which the witness concluded that the line trouble was the submarine cable between Seattle and Fort Lawton, and then at 7:04 p.m., or the entry for 0304 Greenwich time, that the service was restored.

Q. (By Mr. Morrow): Is that correct, Sergeant?

(Testimony of Archie Zehe.)

A. Yes, sir. I had service at that time.

The Court: When did you cease to have any service according to that record or your other knowledge?

A. My last service with Seattle was at 3:00 p.m. when we cleared to release the circuit for Adak. I did not have service again with Seattle until 4:20 p.m.

The Court: 4:20 p.m.?

A. Yes, sir.

The Court: What does 7:04 p.m. have to do with the clearance or blockage of the system?

A. I don't know, he——

Mr. Morrow: That shows the same entry, your Honor, "Clear AAH," has appeared prior to the interruption of service.

Q. (By Mr. Morrow): Isn't that correct? [67]

A. Yes. It's a routine entry where the circuit is working properly, it's a routine entry to show that and also what the traffic conditions were.

The Court: May I assume from what you have already said that you find from that record an indication from it that there was a blockage of transmissions of messages over this circuit for a certain period of time in the afternoon on the 21st of March, 1955? Is that true or not?

A. Yes, sir.

The Court: Will you state the earliest time shown in that record when that blockage of transmissions appeared in that record?

A. When it ceased or when it started?

(Testimony of Archie Zehe.)

The Court: No, when it started, when the blockage became absolute.

A. At 4:20 p.m. Seattle time.

The Court: That is when it cleared, is it not, 4:20?

A. That's when it came back, yes, sir.

The Court: That is not what I am asking you. When did the messaging over that system shut down?

A. With me——

The Court: For the last time. When did it shut down for the last time? Was it at 4:00 o'clock or [68] 3:00 o'clock or——

A. At 3:00 p.m. Seattle time.

The Court: All right. When was the first message that you can see from that record or that you recall from your own knowledge that came back over that line after the line was cleared?

A. 4:20 p.m.

The Court: So that indicates, does it or does it not indicate, that the transmission of messages over that system was blocked from 3:00 p.m. until 4:10, did you say?

A. 4:20.

The Court: 4:20 p.m. on March 21st, is that right?

A. It would not indicate to me that the service was lost between 3:00 and 4:00, sir, because I was not working the circuit between 3:00 and 4:00.

The Court: What does that mean, if anything, as to whether or not there was any interference with

(Testimony of Archie Zehe.)

the service on that cable or that circuit during that time between 3:00 and 4:20?

A. At 3:00 p.m. I released the circuit and left the circuit, released it for Adak to work.

The Court: Do you see in the record there when the circuit was closed down on account of blockage [69] or anything else?

A. No, sir, it would not appear on——

The Court: There is not anything to show in that record when this system quit transmitting messages, is that right?

A. For me it would be 4:00 o'clock when I did not make contact with Seattle then.

The Court: Does it show that?

A. At 4:05 p.m.

The Court: That is what I asked you in the first place. I want to know what hour in the afternoon was the last message indicated by that record as having been transmitted over that system prior to 4:20. You say that is when it opened again.

A. Yes, sir.

The Court: When was it? When was the last time before it opened up for good and business resumed normally?

A. Well, my last message was transmitted to them when I closed at 3:00 p.m. and at 4:00 p.m. I did not make contact, and at 4:05 p.m. I indicate that I have not had contact with them yet.

The Court: Since when?

A. Since 3:00 p.m.

The Court: What conclusion, if any, do you [70]

(Testimony of Archie Zehe.)

draw from that circumstance as to whether the line was blocked from any physical cause?

A. I can only indicate that the line was out from 4:05 p.m. to 4:20 p.m. That is the only time that I can indicate that it was out, from my station.

The Court: At what time?

A. 4:05 p.m.

The Court: That is at Kodiak?

A. Yes, sir, and that's Seattle time.

The Court: And at Kodiak it came back on at 4:20?

A. Yes, sir.

The Court: That is fifteen minutes later?

A. Yes, sir.

The Court: Is that the only time when your station in Kodiak was blocked out on account of any conditions in Seattle or anywhere else on the line?

A. During that time. I assume that that trouble was on the submarine cable. I wouldn't know. I didn't know.

The Court: I am asking you is that the only time from 12:00 o'clock noon on the 21st day of March to 7:00 o'clock in the evening when as far as Kodiak receiving messages and that record are concerned the only time that there was an absolute blockage that you [71] can prove by that record that you made at the time was from 4:05 to 4:20 p.m.

A. Yes, sir.

The Court: You may inquire.

(Testimony of Archie Zehe.)

Mr. Morrow: That's all. I have no further questions.

Mr. Mikkelborg: One or two questions.

Redirect Examination

Q. (By Mr. Mikkelborg): Sergeant, were you scheduled to have regular traffic with ACS Seattle on each hour?

A. Yes, sir, each even hour.

Q. Each even hour. Were you scheduled to receive calls or communicate with ACS Seattle at 4:00 p.m. Seattle time? A. Yes, sir.

Q. Did you receive a call at 4:00 p.m. Seattle time? A. No, sir.

Q. What did that indicate to you?

A. It indicated that there would have to be trouble in Seattle or somebody was sleeping at the switch, which I doubt.

Q. Is it possible for you to tell from this record when the disruption occurred between the hours of the last [72] transmission at 3:00 and the next regularly scheduled transmission at 4:00 p.m.?

A. I don't quite follow you.

Q. Is it possible for you to determine from that, from those two entries for 3:00 and the lack of the entry for 4:00, when the trouble, if any, occurred?

A. No, I couldn't, other than — I didn't make contact.

Q. Why not?

A. I did not make contact at 4:00 o'clock. I did not make contact until 4:20 p.m.

(Testimony of Archie Zehe.)

Q. You were scheduled to make a contact for 4:00 o'clock, were you?

A. At 4:00 o'clock, that's correct.

Q. You were not scheduled to make a contact between 3:00 and 4:00, is that correct?

A. No, that was Adak time.

Q. Is it correct then, Sergeant, that the first notice of any difficulty with the ACS Seattle communication to ACS Kodiak was at 4:00 o'clock?

A. Yes, sir, it would be. It was.

Q. And what entries further explain that difficulty, if any?

A. The entry at 0020 Greenwich, that's 4:20 p.m., the Seattle technician advised us that he had line trouble. That explained to me the reason for the delay between 4:00 o'clock and 4:20 p.m. [73]

Q. And line trouble in that circuit which you worked would refer to what?

A. It would have to refer to the submarine cable according to the circuit diagrams.

Q. Are there alternative methods of communicating with ACS Seattle other than by the circuit you have just described here today, the circuit which includes the submarine cable segment between ACS Seattle and your transmitter at Fort Lawton?

A. You mean——

Q. Is there any alternative means provided for the circuit between your station in Seattle and the station in Kodiak?

A. No, sir, not directly.

Q. Can you get a message from ACS Seattle by

(Testimony of Archie Zehe.)

any means other than the use of the ACS Seattle to Fort Lawton submarine cable?

A. It all depends on what type of message you're referring to, sir.

Q. A telephone message?

A. No, sir. It would have had to have been from the ACS in the Federal Building via this submarine cable to the Fort Lawton transmitter, thence by electronic equipment on into Kodiak.

Q. That is the normal method of transmitting, is it not?

A. Yes, sir. [74]

Q. And in the event of a casualty to the submarine cable how would it be handled?

A. It would be up to Seattle to take proper steps to get leased lines from the Pacific Telephone & Tel. to reroute these transmissions on out to Fort Lawton.

Q. Are such lines available to your knowledge?

A. To my knowledge I couldn't say. I assume those agreements are made and in force.

Mr. Mikkelsen: No further questions.

Recross Examination

Q. (By Mr. Morrow): Sergeant, do you have any entries in your log between 3:55 p.m. Seattle time and 4:05 p.m. Seattle time on March 21st?

A. Between 3:55——

Q. Yes. A. ——and 4:05?

Q. Yes. A. Negative.

Q. You have no entries for that period?

A. No, sir. The last entry on the sheet is at

(Testimony of Archie Zehe.)

2355, which is 3:55 p.m., when we cleared our log for the new day.

Q. So your log is devoid of any information for the period ten minutes prior to 4:05 p.m. on March 21st? [75]

A. Yes, sir, correct.

Mr. Morrow: That's all.

Redirect Examination

Q. (By Mr. Mikkeltorg): Would you state, Sergeant, what significance the absence of the 4:00 o'clock entry means to you as station commander or as——

Mr. Morrow: Objected to as repetitious. That has been gone into twice.

The Court: The objection is sustained.

Mr. Mikkeltorg: Very well. No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Mikkeltorg: The libelant will call Captain Langworthy.

The Court: Come forward, Captain, and be sworn as a witness. [76]

BURT LANGWORTHY

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mikkeltorg): Will you please state your name, sir?

(Testimony of Burt Langworthy.)

A. My name is Burt Langworthy.

Q. Would you spell it, please?

A. The first name is B-u-r-t and the second is L-a-n-g-w-o-r-t-h-y.

Q. Would you state your address, sir?

A. Box 506 Mirror Lake, Washington.

The Court: Mirror Lake, Washington. Where is that?

A. About nine miles this side of Tacoma.

Q. (By Mr. Mikkelborg): And what is your occupation, sir?

A. I'm a harborman employed by the City of Seattle.

Q. And how long have you been so employed?

A. Approximately six years.

Q. Are you in charge of any particular vessel?

A. I am in charge of Patrol Boat No. 7.

Q. Would you describe your duties, please?

A. Well, my duties are to enforce and to regulate the harbor ordinances or laws that pertain to the City of Seattle. This entails governing of excess speed in the [77] harbor, fire and explosives ordinances, safety on piers, reclaiming boats, helping to salvage and attending to boats in distress, and dragging for bodies.

Q. And where are your duties performed? Where are these duties performed?

A. Within the corporate city limits of the City of Seattle, and this includes from Fauntleroy to the south to Golden Gardens to the north.

(Testimony of Burt Langworthy.)

Q. Do you cover these areas in connection with your operations of Patrol Boat No. 7?

A. Yes, we do. This entire area is not covered all the time, only with the exception of calls. The only area that is covered is the immediate harbor, which extends from Smith Cove and Elliott Bay, including the East and the West Waterways and the Duwamish River up to the 17th Avenue South Bridge. That is dependent upon the depth of the water or the tide.

Q. Were you engaged in these duties on March 21, 1955, do you remember? A. Yes, I was.

Q. Where were you on that day?

A. We were on patrol during this particular time from approximately 12:30 until 3:30.

Q. And what area or in what place were you during this patrol from 12:00 until 3:30? [78]

A. We ran north from Pier 50 to Pier 71 and turned and went south and up the East Waterway as far as Pier 24 and out around Harbor Island and up the West Waterway as far as Spokane Street Terminal.

Q. During this patrol do you recall the conditions of the harbor at that time?

A. Yes. There was a strong southeasterly wind or gale blowing. The weather reports that we had received in the morning were from 25 to 35 miles an hour with gusts to 40.

Q. And did you observe this wind?

A. Yes. With the exception of the ferries and the whitecaps on the bay, the ferries had a very

(Testimony of Burt Langworthy.)

pronounced list to the starboard, or — yes, to the starboard from the southerly wind. They looked like sailing ships with a list.

Q. Did you observe the traffic in the harbor on that day?

A. Yes. The traffic was very, very light with the exception of the ferries and possibly maybe one or two towboats with tows, but being to the adversity of weather it was very unpractical to be out there.

Q. Directing your attention to the portion of your patrol which you stated takes you out of the West Waterway, did you observe any traffic in the harbor at that time other than the ferries? [79]

A. Yes. The Princess boat on her scheduled run, I noticed her approximately five minutes after 3:00 in the afternoon just inside or south of Four Mile Rock.

Q. Did you observe her approach?

A. Yes.

Q. Were you aware of where she was headed?

A. Yes, I was.

Q. Are you familiar with the Princess boat?

A. Yes, I am, with their schedule and their time.

Q. What did you observe to — by the way, did you observe this Princess boat so as to identify it?

A. Yes, I did.

Q. What ship was it, if you remember?

A. Louise, the Princess Louise. I'm not clear on that.

Q. What did you observe with respect to the Princess Louise or the Princess boat arriving?

(Testimony of Burt Langworthy.)

A. Well, she came in on her normal course into the harbor and in towards the pier, with the exception of the last portion, and she came farther south than usual.

Q. Did you have any impression as to why she would be coming further south?

A. Due to the force of the wind. As far as I could determine, that was it.

Q. Are you familiar with the area in which you observed the Princess boat? [80]

A. Yes, I am.

Q. What piers are those?

A. Well, the Princess boat docks at Pier 64, which is the CPR terminal at Lenora Street.

Q. Could you see the Princess boat clearly?

A. Yes, I could. I was watching her with a pair of field glasses from the time that we left—rather until the time that I first sighted her inside of Four Mile Rock until the time that we were cut off from view entering into our berth, which is Pier 49.

Q. About how long a time was that that you observed this Princess boat?

A. This was a period of approximately 3:00 o'clock till 3:30. Seven minutes after 3:00, I believe it was.

Q. Would you describe this approach that you say you observed in terms of its relation to the piers in that area?

A. Well, like I stated, she came in on her normal course with the exception of the last portion, and she went farther south than usual. I couldn't

(Testimony of Burt Langworthy.)

tell you the exact number of feet or in distance, as I was at an angle.

Q. Off what piers did she appear to be from your position in the patrol boat?

A. Well,— [81]

Q. During the southermost portion of her approach.

A. The CPR boat could have been as far as Pier 59.

Q. What piers are in that vicinity?

A. Pier 57 is University Street, running on up to Pier 64, which is the CPR pier, is the Lenora Street terminal.

Q. What is the next pier south of Pier 57, if you know?

A. It would be Pier 56. I'm not — let's see, I don't believe I can remember the street.

Q. Would you describe her approach and maneuvers as you observed them near these piers?

A. Like I stated, the ship came in on its normal course with the exception of the last portion, and it came farther south and—

Q. Did it make a turn as it approached?

A. Yes, it made a slight turn as it approached.

Q. Which way, or in terms of its own right or left which way did it turn?

A. It would be to the left as it approached toward the piers, this is off the pier headline, approximately a tenth of a mile, and like I say, it was farther south.

(Testimony of Burt Langworthy.)

Q. In what direction did it head after it turned to its left?

A. It would turn to an easterly direction.

Q. From its position at the southernmost portion of this as you observed it did it head east or did it head— [82] what pier would it have been heading for if it were heading east, would you say?

A. Well, after it—will you restate that, please?

Q. You say that the Princess boat turned to her left at the southernmost point of her approach and headed—I asked you in what direction and I believe you said east. Would you state what pier it would have been headed for if it were heading east as you said?

A. At that time I believe it would have been headed towards Pier 64, after it had made its initial turn. This turn is not a very pronounced turn, but it is a turn of normal course that it always takes. In this case the ship itself was farther to the south this day than usual, but it still made its turn.

Q. Off what pier was it when it made its turn farther to the south?

A. I would say Pier 59, or within that vicinity.

Q. Was there anything else about the Princess boat that you observed while watching her, any maneuvers that she made or anything she might have done?

A. Well, I observed that she had her hook down, her anchor.

Q. And how did you observe that?

A. Well, I could see the anchor chain leading

(Testimony of Burt Langworthy.)

through the hawse pipe and over the side. I also noticed that there was a certain amount of scope on the anchor chain. [83]

Q. What do you mean by scope, Mr. Langworthy?

A. This is the distance or the angle that the anchor chain leads from the ship. It's in accordance with the amount of anchor chain that is played out, the greater the scope according to the depth of the water.

Q. Are you familiar with the area south of Pier 64, the area around Pier 57?

A. Yes, sir, I am.

Q. Are there any distinguishing characteristics with respect to that area?

A. There is a cable area sign posted on the sea wall between Pier 57 and Pier 56.

Q. How far is that visible out into the harbor to the west or northwest?

A. Well, to the west it would be visible a mile.

Q. Had you completed a patrol in that area on that date on March 21, 1955?

A. Yes, we had.

Q. And did you observe that sign on that date?

A. With due respect—I always observe it. We inspected it. I always observe it. There was no special note made, but I know the sign was there at the time.

Q. How long has that sign been there, if you know, to your knowledge, Captain?

(Testimony of Burt Langworthy.)

A. The sign has been there for five years that I know of. [84]

The Court: What does the sign say?

Q. (By Mr. Mikkelborg): Yes, Captain, would you state what the sign is or says?

A. The sign states, "Cable area, no anchoring."

Q. How far is that from the general area where you observed the Princess boat making her turn? Is it close or far?

A. No, it's moderately close, within 500 yards or less.

Q. In which direction?

A. Will you please repeat that? Which direction, what do you mean?

Q. You say you observed the Princess boat being something like 500 yards from I believe Pier 57. A. Right.

Q. In what direction from Pier 57, south, north, east, west, or what?

A. Well, as far as I could determine at the time it would have been—the boat would have been northwest or west. I would say due west.

Q. Due west of what pier?

A. Of Pier 57.

Q. And at what point was this in her maneuvers?

A. This was at her turn, when she was approaching, as far as I could determine.

Q. Captain, you say that you observed her due west of Pier 57. Would you explain—I may have misunderstood you. [85] Would you explain how

(Testimony of Burt Langworthy.)

that is with relation to what you said earlier with regard to Pier 58 or 59? Perhaps you could clear it up by describing the operation of the turn in relation to these piers.

Mr. Morrow: I object to the leading nature of the question. The witness has identified the turn of the Princess Louise at a certain pier. His testimony has been inconsistent, and I——

The Court: The objection is sustained, not for the reasons stated for not accepting the truth particularly of the last commenting statement, but the objection as leading is sustained, with the privilege of redrafting the question if you feel you can properly.

Q. (By Mr. Mikkeltorg): You heard Mr. Morrow's comments, Captain Langworthy. Would you again relate what you observed with respect to the maneuvers of the Princess Louise, relating it wherever possible to some point which we can identify on the shore?

A. Well, I could state it. I observed the boat on its normal approach from the position where we were. This was at the entrance to the West Waterway. I observed the Princess boat coming in to make her berth, in other words to her approach, and I also observed that the boat was farther to the south than it normally is. I couldn't tell you how close to the pier it came. [86]

Q. What pier?

A. To Pier 57 and to Pier 64, because I was at an angle. From where I looked, from where I could

(Testimony of Burt Langworthy.)

see and where I was watching with the field glasses it looked like it was very, very close, but the number of feet I couldn't tell you. I don't know.

Q. What was her position as you last saw her before you lost sight of her?

A. Well, let me finish first, please.

Q. Yes, very well.

A. The Princess boat came in. I did not see her anchor drop but I saw her anchor chain leading over and I also saw the scope of her anchor chain leading out. In other words, the angle. I would just make a guess it was approximately thirty-five degrees or so, more or less. And then she started backing down and then was assisted by a tug after she was right close to the pier. Now, the distance I don't know. And the tug assisted her until she was out in the harbor again.

Q. And is that where you lost—where did you lose sight of her?

A. And then at that time we went into Pier 59, which is our regular berth, and we tied up.

Q. Pier 59?

A. Pier 49, excuse me. Pier 49, which we tied up, and I [87] lost sight of her at 3:30, and at this time the Princess boat was out in the harbor again.

Q. Referring to your testimony regarding the scope of the anchor chain, what does that mean? What does the angle on the chain mean, if anything, with regard to that angle?

A. Well, it means that the chain is being drug or pulled forward or aft, whichever way the scope

(Testimony of Burt Langworthy.)

would show. If the scope was leading from the bow to the stern it would mean that the anchor was being pulled, and it was leading from the bow away from the bow, it would mean that it was being drug.

Q. Thank you, Mr. Langworthy.

Mr. Mikkelborg: You may cross examine, Counsel.

The Court: At this time we will take a short recess, about ten minutes.

(Short recess.)

The Court: You may proceed. All are present.

Cross Examination

Q. (By Mr. Morrow): Captain Langworthy, do you hold any licenses with the United States or the State of Washington or any other governmental body? A. No, sir. [88]

Q. Have you ever held any licenses——

A. No, sir.

Q. ——from the Department of Commerce or the United States Coast Guard? A. No, sir.

Q. How long have you been employed by the City of Seattle?

A. I went to work for the City of Seattle in 1951, August 29th. I worked for them until 1953, October 30th, and I was laid off and I came back to work for the City again on the same job on July 6, 1954.

Q. How long had you been employed on the harbor patrol boat prior to March 21, 1955?

(Testimony of Burt Langworthy.)

A. On this particular boat approximately two years.

Q. Was that continuously? A. Yes, sir.

Q. I see. And how old are you, sir?

A. Thirty-one.

Q. You're thirty-one years old?

The Court: How much?

A. Thirty-one.

Q. (By Mr. Morrow): Had you had previous experience on the water? A. Yes.

Q. What was that?

A. I worked for Washington Tug & Barge during the summer [89] of '51. Prior to that I worked for New England Fish Company from 1947 until 1950, both years inclusive, and I worked for New England Fish Company in 1944. I was employed as a deckhand, mate and a second engineer during these various years.

Q. That was on a——

A. Cannery tender in Alaska.

Q. In Alaska? A. Yes, sir.

The Court: How old were you when you began doing that kind of work?

A. Seventeen years old.

Q. (By Mr. Morrow): Have you been employed in connection with marine industry since you were seventeen in some capacity or other?

A. With the exception—yes, I have. I was going to say with the exception of my service, but I was also connected with the marine end of it there also.

(Testimony of Burt Langworthy.)

Q. And I understand that you are now the senior harbor patrolman; is that correct?

A. On my particular watch.

Q. On your particular watch. Now, what was your watch on March 21, 1955?

A. From 8:00 o'clock in the morning until 4:00 o'clock in the afternoon. [90]

Q. Did the harbor patrol boat No. 7 maintain a log? A. Yes.

Q. And is that log available for the period of March, 1955? A. That I couldn't say.

Q. What entries does your log contain?

A. Mostly of inspections pertaining to safety, anything that might be connected with the storage of inflammable materials, red label cargo up on piers, or anything that would have or concern with the ordinances of the City of Seattle.

Q. Would your log show the dates on which you were on harbor patrol? A. Yes.

Q. Would they likewise have entries pertaining to the weather? A. Yes.

Q. How long has it been since you looked at the entries of your log for March 21, 1955?

A. Approximately a year, I would say, just guessing.

Q. Did someone interview you in connection with this matter about a year ago?

A. I believe it was about that time, yes.

Q. Was that an investigator for the United States Government? A. Yes, it was.

(Testimony of Burt Langworthy.)

Q. And did he have access to your log at that time? [91] A. No, he did not.

Q. Did you refer to your log at that time?

A. I did.

Q. Is your log available now?

A. That I don't know.

Q. So all your testimony here today is simply based upon recollection and without reference to any entries in your log book, is that correct?

A. Would you please say that again?

The Court: Let it be repeated by the reporter.

Mr. Morrow: I can repeat it.

The Court: Let the reporter read it.

Mr. Morrow: All right.

(The reporter read the last question.)

A. Yes.

Q. (By Mr. Morrow): By the way, how did you refresh your recollection for your testimony today?

A. Like I said, I was approached shortly after the time of this accident, or this occurred, this mishap occurred, and then approximately a year later, and then approximately a month ago.

Q. Have you discussed this matter with somebody recently? A. Yes.

Q. Who have you discussed it with?

A. Mr. Mikkelsen. [92]

Q. Did somebody representing the United States take your statement concerning this matter?

A. Yes.

(Testimony of Burt Langworthy.)

Q. And was any reference made by you to your log at that time? A. I cannot remember.

Q. Now, you have indicated in your testimony that you made your observations in this matter between 3:07 o'clock p.m. and 3:30 o'clock p.m. on March 21, 1955; is that correct?

A. That's correct.

Q. That would be for a period then of twenty-three minutes, would it?

A. Approximately, yes.

Q. What position was the harbor boat No. 7 in at 3:07 p.m.?

A. We were up the West Waterway approximately a quarter of a mile.

Q. A quarter of a mile where, from Todds?

A. Yes, from the blinker light at Todds.

Q. So that at 3:07 Pier 64 was not as yet in view, was it? A. Correct.

Q. Now, how long after 3:07 was it that say Pier 64 came into view?

A. Maybe six minutes, five minutes.

Q. Five or six minutes? [93]

A. Approximately.

Q. What was the Princess Louise in the first time you observed her?

A. She was in need of assistance. Oh, I beg your pardon. She was on her scheduled course.

Q. Do you mean she was coming in toward Pier 64?

A. She was coming into the harbor.

Q. Coming into the harbor? A. Yes.

(Testimony of Burt Langworthy.)

Q. Was that at 3:07 p.m.?

A. It was very near to it.

Q. Well, now, how did you determine the time 3:07 p.m.?

A. We have certain check points that are logged as to where we are and the time, and this check point at this time was Albers Milling, or Fisher's Milling Company, Fisher's flour mill.

Q. You couldn't see the Princess Louise from Fisher's, could you?

A. From the corner of Fisher's, yes.

Q. Did you?

A. I don't know if I did or not.

Q. So you don't know whether you first saw the Princess at 3:07 or a short time thereafter, is that correct?

A. No, a short time prior.

Q. A short time prior? [94]

A. Right. I said in my statement it was approximately 3:00 o'clock or 3:07.

Q. Where is this record that you speak of that shows this time?

A. It would be in the Seattle Harbor Department files.

Q. Is that contained in the log?

A. This portion that I tell you the check point is, yes.

Q. Now, by the way, at 3:07 were you under way?

A. Yes.

Q. What time would you have reached the north-
erly end of West Waterway?

(Testimony of Burt Langworthy.)

A. Approximately 3:15, or maybe just a few minutes prior.

Q. Now, was the Princess Louise within view of yourself aboard the harbor boat No. 7 during that period of time? A. Yes.

Q. After passing the—what is it, a light or a beacon at the north end of West Waterway?

A. It's a blinker light, yes.

Q. Yes. After passing that beacon or light what course did your vessel take?

A. An easterly course.

Q. That would be more northeasterly, wouldn't it, toward Pier 49?

A. No, sir. We don't run on straight lines.

Q. I see. [95] A. We're on a patrol.

Q. I see. You were on patrol? A. Right.

Q. Were you in charge of the watch?

A. Yes.

Q. You had other things to do then than to watch the Princess Louise dock, didn't you?

A. I did, yes.

Q. And did you do other things?

A. With the exception of what called for my attention, no.

Q. How many members did you have on your crew? A. One.

Q. And what were his duties?

A. He was running—what are his duties?

Q. What were his duties at the time?

A. He had the helm.

Q. He was steering? A. Right.

(Testimony of Burt Langworthy.)

Q. Under your direction?

A. Well, he had the helm. I can't say he was under my direction. He knew the course, he knew what he was supposed to do and he did it.

Q. By the way, where is Pier 49 in reference to the footing of any Seattle street?

A. It isn't any more. It has been removed. [96]

Q. Well, at that time was it at the foot of Jackson Street?

A. The foot of Washington Street.

Q. The foot of Washington Street. So when you came out of East Waterway now you took a course to the east, and how long did you run on an easterly course?

A. Approximately four to five or six minutes.

Q. And where did that take you to?

A. Within a line between the piers of 39 and 42.

Q. And were were the piers of 39 and 42 in 1955?

A. Right where they are located now.

Q. And where is that, with reference to some Seattle street?

A. That's south of King Street.

Q. About ten piers down from 49, is that it, or ten blocks, approximately ten blocks, or can you give us a better idea of just where it is?

A. Pier 43 is King Street.

Q. I see.

A. I beg your pardon. Pier 45 is King Street pier.

Q. And then from that point where did you go?

(Testimony of Burt Langworthy.)

A. Up the face of the harbor on the pier head-line into our pier.

Q. Now, what was your entire running time?

A. I don't know the exact running time. I could only approximate it.

Q. Was it between 3:30 and 3:07, approximately twenty-three [97] minutes?

A. Do you mean our complete running time?

Q. Yes.

A. No, sir. From the time we rang out until the time we rang in I would say it was approximately two and a half hours.

Q. Oh, I mean from this 3:07 point where you were out near Albers until you got to your dock.

A. It would be from approximately 3:00 or 3:07 until approximately 3:30.

Q. Approximately twenty-three minutes running time, is that correct? A. Yes, right.

Q. That's the period I'm talking about, Captain. Now, during that time how many observations did you make of the Princess Louise and her approach to Pier 64?

A. I watched her continuously as much as I could spare from taking the field glasses down and looking at our own position and looking on shore and then returning my attention to her.

Q. How many times did you pick up your field glasses to observe the Princess Louise on her approach to Pier 64? A. I can't tell you.

Q. Well, would it have been once?

(Testimony of Burt Langworthy.)

A. I held the glasses, I imagine, I had them around my neck. [98]

Q. Did you hold the glasses on her for the full twenty-three minutes? A. No, sir.

Q. Did you put the glasses down on several occasions at least? A. I may have.

Q. Well, what is your best recollection as to how many observations you made of the Princess Louise with your binoculars?

A. Well, let's say twenty-five.

Q. Twenty-five times? A. Yes, sir.

Q. You were then picking up and putting the glasses down about once a minute?

A. Once, yes, it might have been that short a time.

Q. I see. So you had practically a constant view of the Princess Louise through the binoculars during this period of twenty-three minutes, is that correct? You got a good look at her? A. Yes.

Q. Now, you said in your direct testimony, Captain Langworthy, that you couldn't tell how far out the Princess Louise was from Pier 57 or Pier 64. Now, is that because of your line of vision from West Waterway? A. That's correct.

Q. In other words, you were looking northerly most of the time, were you not? A. Correct.

Q. You couldn't tell the distance between the Princess Louise and say the shore line or pier line because of your angle of vision at any time, could you? A. Not in so many feet, no.

(Testimony of Burt Langworthy.)

Q. No. Well, you couldn't be sure in any event, could you? A. Yes.

Q. Well, now, if you looked right straight down this wall here and you have some side walls you can get an idea of how far it is, can't you?

A. Yes.

Q. But can you look straight ahead and judge distances very accurately?

A. You can when you have a background.

Q. Well, what was your background.

A. The lettering on the piers. In this particular case it would have been Pier 64.

Q. When you made the statement, Captain Langworthy, that you couldn't tell how far the Princess Louise was from Pier 57 or Pier 64, was it because you didn't have a sufficient angle or object upon which to make a calculation of distance?

A. Pardon me? [100]

Q. And that would be true too, wouldn't it, in respect to any position that the Louise had in reference to either Pier 57, Pier 59 or Pier 64 at any time, wouldn't it?

A. I can't answer that. I don't know.

Q. Well, you admit that your angle of vision was such that you couldn't tell accurate distances, isn't that correct? A. Yes.

Q. Well, now, isn't it likewise true that you couldn't tell accurately the position of the Princess Louise at any time in reference to Piers 57, 59 or 64?

A. May I ask a question before I answer that?

(Testimony of Burt Langworthy.)

Q. Well, will you try to answer the question first, and then explain it, if you like.

Mr. Morrow: Would you read the question back.

The Court: It will be read.

(The reporter read the question beginning
Line 8, this page.)

A. I will say this, that I could designate or I could approximate the position of the Princess boat by reasonable guess or by the background or by any object with any comparison to the ship, from which the ship might blot it out, or by man or by any other means which I have a background that I can compare with. A person that works on the water learns to judge distance very closely. I believe I have as much experience with the [101] limited service I had as anyone else, or I would say that my judge of distance was fairly accurate.

Q. (By Mr. Morrow): All right. Do you wish your testimony to be now that your judge of distance on this occasion was fairly accurate? Is that your testimony?

A. No, sir, I am staying to my same testimony.

Q. That it was not accurate, is that correct, that you can't be accurate in judging distances due to the position you were in with reference to Piers 57, 59 and 64? Is that a fair statement?

A. I'm sorry, I can't answer that. I don't realize what you're driving at.

Q. Very well. Now, can you with any reasonable degree of accuracy state where the Princess Louise was at any time in reference to Pier 64?

(Testimony of Burt Langworthy.)

A. Yes.

Q. Now, what position was your vessel in when you observed the Princess Louise in reference to a position in connection with 64?

A. To the southwest.

Q. You were southwest, therefore the Princess Louise and 64 were northeast, is that correct?

A. Yes.

Q. Now, were you looking—well, how far was the Princess Louise from 64 at this point that you're talking about? [102]

A. Do you mean the time she was in need of assistance?

Q. Well, let's fix first of all the time that you referred to when you observed the Princess Louise in connection with close proximity say to 64.

A. How close was she?

Q. No, the time, let's fix the time.

A. The time.

Q. You said your line of vision was northeast, you looked northeast. Now, what time was that?

A. I would say approximately 3:20.

Q. Approximately 3:20. That was ten minutes before you docked, is that correct?

A. Correct.

Q. Now, where was the Princess Louise at that time with reference to Pier 64?

A. She was very, very close to it and she was in need of assistance.

Q. Well, now, when you say very, very close, have you any idea of the distance?

(Testimony of Burt Langworthy.)

A. Within maybe fifty feet.

Q. Fifty feet. Now, was the Princess Louise between yourself and Pier 64 at the time?

A. You might say part of her was, yes.

Q. What was the fore and aft line of the Princess Louise when you observed her at 3:20? [103]

A. She was almost at a right angle with the pier headline.

Q. And how does the pier headline run?

A. It runs north and south.

Q. Was Pier 64 the other side or northeast of the Princess Louise when you made this observation? A. Right.

Q. It was therefore impossible, wasn't it, for you to determine what the distance was between the Princess Louise and Pier 64 in a direct line of vision, wasn't it? A. No, sir.

Q. It wasn't?

A. No, sir. If she hadn't been in trouble she wouldn't ask for assistance.

Q. Well, that isn't the question. When was it that you saw the Princess Louise opposite Pier 59 or in line with Pier 59?

A. On her approach to the pier, to Pier 64.

Q. You indicated that that was as far south as she got on the first approach?

A. I said from where we were, the vantage point, as near as I could tell.

Q. She got no further south than Pier 59?

A. I didn't say that.

Q. Well, that's where you saw her?

(Testimony of Burt Langworthy.)

A. Approximately, yes. [104]

Q. All right. What time was that again?

A. That was shortly after 3:00, between—approximately 3:15.

Q. Now, that was the first approach of the Princess Louise to Pier 64, was it?

A. (Witness nods his head.)

Q. Now, did you see the Princess Louise on her second approach? A. No, sir.

Q. You didn't see the Princess Louise on her second approach to Pier 64, is that correct?

A. That's correct.

Q. I see. Now, you have indicated that you saw the anchor chain and the anchor of the Princess Louise. Would you describe that again?

A. I saw the anchor chain, I didn't see the anchor.

Q. You didn't see the anchor? A. No, sir.

Q. Well where was the anchor chain?

A. The anchor chain was leading from the hawse pipe.

Q. Yes?

A. And there was scope. In other words, angle.

Q. Yes?

A. From the bow to the anchor chain.

Q. Now, what was the Princess Louise doing when you made [105] this observation of the anchor chain with the scope on it?

A. She was backing.

Q. And what was her position in relation to Pier 64 at that time?

(Testimony of Burt Langworthy.)

A. She was right off of the face of the pier.

Q. That's right. The Princess Louise when you observed her anchor chain was off Pier 64, isn't that correct? A. (Witness nods his head.)

Q. And wasn't she being blown to the northerly rather than to the southerly?

A. That's correct.

Q. Now, how far northerly did the Princess Louise move while she was in a stern position?

A. Will you clarify your question, please?

Mr. Morrow: Will you read it back.

A. No, may I ask this: Do you mean in the harbor or to the north?

Q. (By Mr. Morrow): To the north.

A. I couldn't tell you.

Q. Well, you agree that while the Princess Louise was making sternway into the harbor she was also being blown by the wind northerly, isn't that correct?

The Court: If you wish the question read, the Court will have that done. [106]

The Witness: May I have the question read, please?

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

A. Yes.

Mr. Morrow: May we have this marked as an exhibit.

The Court: It will now be marked as the next exhibit.

(Testimony of Burt Langworthy.)

Mr. Morrow: We can mark it our exhibit.

The Court: It may be marked Respondent's Exhibit A-1.

(U. S. Coast and Geodetic Survey Chart No. 6449 was marked Respondent's Exhibit No. A-1 for identification.)

Mr. Mikkelsen: If the Court please, it is understood that what is now being marked Respondent's Exhibit A-1 for identification is the chart referred to in the pretrial order as Libellant's 1. We will stipulate to its admission.

The Court: Do you offer it now?

Mr. Morrow: Yes, I offer it.

The Court: It is now admitted.

(Respondent's Exhibit No. A-1 for identification was admitted in evidence.) [107]

Mr. Morrow: Let the record show that this is, in accordance with the pretrial order, C. and G. S. Map 6449 corrected to March 21, 1955.

Q. (By Mr. Morrow): Captain Langworthy, are you familiar with Respondent's Exhibit 1 before you? A. Yes, I am.

Q. Are you able to designate thereon which is Pier 64? A. Yes, I am.

Q. Would you take a lead pencil and run a line out from Pier 64 and mark opposite that "64"?

(Witness marks on Respondent's Exhibit No. A-1.)

Q. Now again, Captain Langworthy, what is

(Testimony of Burt Langworthy.)

your best estimate of the position of the Princess Louise off 64 when you saw her anchor chain as though she was dragging her anchor?

A. Do you want me to mark it?

Q. Well, I was asking for the distance first.

A. Approximately fifty feet.

Q. All right. Would you put that in there then, please

(Witness marks on Respondent's Exhibit No. A-1.)

Q. Would you put a mark opposite that, "P-1"?

(Witness marks on Respondent's Exhibit No. A-1.) [108]

Q. Now would you indicate thereon the course of the Princess Louise during the period she made sternway?

A. Do you want the full course?

Q. During the period she made steerageway, yes.

A. Sternway?

Q. Sternway. My error.

(Witness marks on Respondent's Exhibit No. A-1.)

Q. All right.

Mr. Morrow: May I see that now.

(Respondent's Exhibit No. A-1 was handed to Mr. Morrow.)

Q. Now, the end of your red line indicates a depth reading of 441 feet, is that correct?

A. That's approximately, yes.

Q. And is that where the vessel changed course then?

(Testimony of Burt Langworthy.)

A. I don't know. I lost course of her—I lost track of her at that time.

Q. You lost track of her at that time?

A. Yes.

Q. But she made sternway throughout the course you have indicated by the red line?

A. Yes.

Q. All right. Now would you just mark the end of the line "P-2"? [109]

(Witness marks on Respondent's Exhibit No.

A-1.)

Q. All right, thank you. Captain Langworthy, what is the distance from the beacon on West Waterway to Pier 64? Do you know that distance or would you like a pair of dividers to check it?

A. I would like a pair of dividers, please.

Q. All right.

(A pair of dividers was handed the witness.)

A. Approximately a mile and a quarter. If you want it closer than that I'll give it to you.

Q. That's close enough. What is the distance from your dock, Pier 49, to Pier 64?

A. Half a mile.

Q. By the way, what field of vision does your binoculars have?

A. 60-30, or 6-30, 6 power, 30 range.

Q. Could you pick up the entire Princess Louise in your field of vision in the binoculars?

A. Yes.

Q. Could you see what the Princess Louise was doing without binoculars?

(Testimony of Burt Langworthy.)

A. Prior to when we went into our berth we could, yes.

Q. But was that distinct? A. Pardon.

Q. Was it a distinct view?

A. Yes, very distinct.

Q. What was the weather at the time?

A. Very adverse.

Q. Was it clear?

A. Yes. It was sunny, to be exact.

Q. I see. All right, thank you Captain.

Mr. Morrow: That's all the questions I have at this time.

Redirect Examination

Q. (By Mr. Mikkelborg): Captain Langworthy, referring to your testimony on cross examination with regard to the point in the Princess Louise's approach when you said she was some you estimated fifty feet off Pier 64 with the anchor chain showing a drag indicating that she was backing, had you observed the anchor or the anchor chain or the angle of the chain at any time prior to that point of her approach? A. Yes, I had.

Q. What was the earliest time that you recall seeing the anchor chain in her approach?

A. Shortly after she changed her course and headed towards Pier 64. [111]

Mr. Mikkelborg: No further questions.

Mr. Morrow: I have no questions.

The Court: Step down.

(Witness excused.)

The Court: We will take a recess in the trial at this point. Those connected with this trial are excused until tomorrow morning at 10:00 o'clock and may now retire.

(Thereupon, at 4:20 o'clock p.m. a recess herein was taken until 10:00 o'clock a.m., Wednesday, August 20, 1958.)

Wednesday, August 20, 1958. 10.05 o'clock a.m.

(All parties present as before.)

The Court: In the case on trial you may resume the proceedings.

Mr. Broz: If it please the Court, the Government will call William M. Martin.

The Court: Mr. Martin, please come forward and be sworn as a witness. [112]

WILLIAM M. MARTIN

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Broz): Will you state your name, address and occupation, please?

A. My name is William M. Martin. My address is 1645 North 167th Street, Seattle. My occupation is supervisory cartographer for the——

The Court: Supervisor of cartography?

A. Supervisory cartographer.

The Court: Supervisory cartographer. For whom?

(Testimony of William M. Martin.)

A. For the United States Coast and Geodetic Survey.

Q. (By Mr. Broz): Where is your office, Mr. Martin?

A. At 606 Federal Office Building.

Q. In Seattle? A. That is correct.

Q. How long have you held that position?

A. Since July of 1954.

Q. What are your duties generally?

A. To supervise the employees in the office relative to the plotting of hydrographic surveys, notes of which are taken by survey parties in the field.

Q. What is done with the information when it is received from the survey parties in the field?

A. The information is checked, plotted on survey sheets and map projections, they are sent to us for verification and compilation of nautical charts.

Q. How long have you been employed in this type of work?

A. I've been in the Seattle office since March of 1941.

Q. What did you do prior to 1941?

A. I spent one year as a lithographer in the Washington office of the Coast and Geodetic Survey.

Q. What did your duties as a lithographer in the Coast and Geodetic involve?

A. Work on glass plates, or rather glass negatives and aluminum plates related to the publication of nautical charts.

(Testimony of William M. Martin.)

Mr. Morrow: We will admit Mr. Martin's qualification as a cartographer.

The Court: If that can be used to save time——

Mr. Broz: That may be stipulated, your Honor.

The Court: The Court will approve of that.

Q. (By Mr. Broz): Can you state the general purpose of your work, Mr. Martin?

A. The general purpose of my work is the processing of surveys relative to the depth of waters lying off coastal areas. [114]

Q. Is that eventually translated into nautical charts? A. It is.

Q. Are these charts generally used by mariners?

A. They are.

Q. Can you state by whom they are used, if you know?

A. Well, they are used by the United States Navy, Coast Guard, commercial interests, commercial fishermen, commercial steamship companies, yachtsmen.

Q. That will be sufficient.

Mr. Broz: May the witness be shown Respondent's Exhibit No. A-1, please.

The Court: That will be done.

(The exhibit was handed to the witness.)

Q. (By Mr. Broz): Mr. Martin, please examine Respondent's Exhibit No. A-1 and state if you know whether that particular chart was in general use on March 21 of 1955. A. Yes, sir, it was.

The Court: What is the number of it, Mr. Martin?

(Testimony of William M. Martin.)

A. 6449, your Honor.

Q. (By Mr. Broz): Was that the latest Coast and Geodetic survey chart of the area charted thereon? A. Yes, sir.

Q. Does the chart show cable crossing areas for submarine telephone and telegraph cables? [115]

A. Yes, it does.

Q. Can you state whether this particular chart shows the existence of an underwater cable in the vicinity of Pier 57 in Elliott Bay?

A. It does, and it's so labeled.

Q. How is it labeled?

A. By the note "Cable area".

Q. What other indication appears in the chart indicating that a cable area exists off Pier 57?

A. Two red dashed lines extending offshore from the pier area.

Q. Mr. Martin, can you state from examining the chart and from your experience as a cartographer whether a ship lying directly off Pier 57 not more than 960 feet away from the head of the pier, would a ship lying in that position be within the charted area shown on the map as a cable area?

Mr. Morrow: I wish to object to the form of the question. The question calls for his knowledge within his experience and also in reference to the chart.

Now, the witness has not qualified himself in reference to a personal experience and knowledge of this particular area, but he has thus far limited his knowledge to that as a cartographer, by reason of

(Testimony of William M. Martin.)

which work he relies upon the experience and knowledge and [116] information received by that work, and I submit that he has not qualified himself from the point of personal experience and knowledge of this particular area to justify an expert opinion.

The Court: Any response?

Mr. Broz: Your Honor, the witness has qualified himself as a cartographer. If he can't read that chart, nobody can.

Mr. Morrow: Well, I have no objection to his referring to the chart, but the question went to his personal experience.

The Court: Insofar as it relates to personal experience the objection is sustained. Resubmit the question.

Q. (By Mr. Broz): Mr. Martin, are you acquainted with the area of Elliott Bay?

A. Yes, sir, I am.

Q. Has your work been concerned with the area known as Elliott Bay? A. At times it has been.

Q. Have you conducted surveys and have you compiled records and chart readings of Elliott Bay?

A. I have made chart corrections in the area of Elliott Bay.

The Court: I think you ought to give the witness a chance to say as of what time he did those [117] things or had those experiences.

Q. (By Mr. Broz): During what periods of times has your work been concerned with the area known as Elliott Bay?

(Testimony of William M. Martin.)

A. Well, just recently I completed a survey, not directly connected with hydrographic surveying, although it was controlled survey, triangulation from the area of Magnolia Bluff, Duwamish Head, Federal Office Building.

The Court: Yourself personally, did you ever determine the location of a cable landing in Elliott Bay?

A. No, sir. That is not the jurisdiction of the United States Coast and Geodetic Survey. That comes——

The Court: Did you ever determine where that was located personally so that you personally knew where it was located?

A. No, sir, I've had no——

The Court: Did you ever have any experience with any station using the cable which use depended upon official or record knowledge of the landing point of the cable in Elliott Bay?

A. I'm a little confused, your Honor.

The Court: Read the question.

(The reporter read the Court's last question.)

A. No, sir, I have not. [118]

The Court: You may inquire.

Q. (By Mr. Broz): Mr. Martin, have you ever examined the original survey records taken by the Coast and Geodetic Survey upon which the chart before you, Chart 6449, was drawn or compiled?

A. Yes, sir, I have.

Q. And are you familiar with the soundings off Pier 57?

A. Reasonably so, I think.

(Testimony of William M. Martin.)

Q. And the distances involved in the various references that appear on Chart 6449?

A. I believe so.

Q. Now with respect to that area off Pier 57, Mr. Martin, can you state whether a ship appearing or a ship in position 960 feet off Pier 57 would be within the charted area on the map, on the chart, described as "Cable area"?

Mr. Morrow: I wish to object.

The Court: If he knows.

Q. (By Mr. Broz): If you know.

The Court: After considering those conditions stated in the question.

Mr. Broz: Yes, your Honor.

Q. (By Mr. Broz): If you know, Mr. Martin.

Mr. Morrow: I wish to object to the question on the ground of—— [119]

The Court: The objection is sustained, and you may inquire if he has sufficient knowledge to give the answer to the question you want to ask.

Q. (By Mr. Broz): Mr. Martin, can you state from your experience and knowledge of the area shown on the chart in the vicinity of Pier 57 in Elliott Bay——

Mr. Morrow: I would like to make another objection.

The Court: The objection is sustained. It would be competent to ask this witness to consider things that you think are officially available to him there on the witness stand in front of this witness, it would be proper to ask the witness to examine those documents if you think they are public documents

(Testimony of William M. Martin.)

and those exhibits if they are in the record and then ask him does he have knowledge about such and such a subject. If his answer seems to qualify him for the answer to the question you wish to propound, then propound the question.

Q. (By Mr. Broz): Mr. Martin, please examine the cable area shown on the chart marked 6449, Coast and Geodetic Survey Chart 6449, with reference to the cable area appearing off Pier 57. Are you familiar with that area on the chart?

A. Yes, sir, I am. [120]

The Court: Do you mean is he personally familiar with it by his official experiences?

Q. (By Mr. Broz): Does your experience familiarize you with the area off Pier 57?

A. Yes, sir, it has so far as the chart is concerned.

Q. Can you state from examining that chart the distance off Pier 57 which the red lines indicating a cable area extend into the bay?

Mr. Morrow: I wish to object. The chart speaks for itself. There's the marked cable area which the witness has identified.

The Court: The objection is overruled. It is competent to hear an official say what his understanding of the information is and what information he gets from the chart, in my opinion. Therefore, the objection is overruled.

A. The distance——

The Court: Just a minute. Read the question,

(Testimony of William M. Martin.)

Mr. Reporter. Have in mind the specific form of the question, Mr. Martin, and answer that.

(The reporter read the last question.)

The Court: Answer directly.

A. Approximately 420 yards.

The Court: Read the question and the answer for the Court's reminder and for the reminder of all [121] others present.

(The reporter read the question and answer as follows:

"Q. Can you state from examining that chart the distance off Pier 57 which the red lines indicating a cable area extend into the bay?

"A. Approximately 420 yards.")

Q. (By Mr. Broz): Can you state how far the cable area indicated on the chart extends into the bay from the head of Pier 57?

The Court: Was that 450? What was the denomination?

A. Approximately 420 yards, your Honor.

The Court: Yards. You may proceed.

A. From the head of Pier 57 that distance is approximately 450 yards.

The Court: What is it that is 450 yards distant from some place?

A. From the head of Pier 57.

Q. (By Mr. Broz): Is that the inshore head?

A. No, sir, that is the offshore head. The other distance that I gave you is offshore, but the line of the shoreline runs in a diagonal towards the northwest.

(Testimony of William M. Martin.)

The Court: Is this a pier head that you are [122] talking about as a point from which or to which you are making a measurement now?

A. It's the outer or western limit of the pier.

The Court: Is it sometimes referred to as the outer pier head or as an outer limiting or specifying description or does the outer specifying description have any meaning at all?

A. No, sir.

The Court: What is it, then?

A. It's the actual limit of the pier, your Honor.

The Court: Pardon?

A. The actual north or west limit of the pier, from the actual pier end.

The Court: Do you mean from the dry land on the bank?

A. No, sir, from the offshore end.

The Court: To the end of the pier it is so many feet or yards, is that what you are saying?

A. No, sir. The thing I'm saying is that the cable area as shown on this chart extends approximately 450 yards west from the west end of Pier 57.

The Court: Is the west end the so-called seaward end of the pier? [123]

A. Yes, sir, it is.

The Court: You may inquire.

Q. (By Mr. Broz): Are you familiar with the soundings that appear on that chart, Mr. Martin?

A. Yes, I am.

(Testimony of William M. Martin.)

Q. And you are familiar with the way that they are recorded?

A. Yes, I am.

Q. And what do those figures represent?

A. The depth of water in feet.

Q. What—

A. At mean lower low water, which is the charting datum in this chart.

The Court: Mean lower low water?

A. That's correct.

The Court: The mean lower low water depth of what, of the water? A. The water.

The Court: Of the bay?

A. That "mean lower low water" terminology is a term applied to tidal datum, being the result of the mean of all the tides over a period of years.

Q. (By Mr. Broz): Would it be necessary, Mr. Martin, to determine the depth of the water appearing on that chart at a given time during the day to add the actual tide depth at that particular time of day? [124]

A. Yes, sir, it would.

Mr. Broz: Mark this for identification, please.

The Clerk: It will be marked Libellant's Exhibit No. 2.

(Certified copy of tidal record was marked Libellant's Exhibit No. 2 for identification.)

The Court: It would seem to me that Counsel ought to be able to agree upon the admissibility of documents like this. Here is a document that is a

(Testimony of William M. Martin.)

certified copy of a public record. It ought to have been already indicated that——

Mr. Broz: It has been, your Honor. The purpose is simply to have this witness identify it for the record.

The Court: What do you call it? Give it a name that both——

Mr. Broz: Tidal record, your Honor.

The Court: Tidal record.

Mr. Morrow: It is agreed it may be admitted, your Honor.

The Court: Do you offer it?

Mr. Broz: I will offer it, your Honor.

The Court: It is admitted.

(Libelant's Exhibit No. 2 for [125] identification was admitted in evidence.)

Q. (By Mr. Broz): Mr. Martin, examining what has been marked as Libelant's Exhibit No. 2, state what it is.

A. This is a certified copy of the tabulation of the hourly heights of tides from the tide station at Colman Dock in Seattle.

Q. For what day?

A. For March 21, 1955.

Mr. Broz: You may examine.

The Court: At Colman Dock, was that the answer?

The Reporter: Yes, your Honor.

The Court: That is not Pier 57, is it Mr. Martin?

A. No, sir, it's not. That's Pier 52.

(Testimony of William M. Martin.)

The Court: Pardon? A. That is Pier 52.

The Court: You may proceed.

Mr. Morrow: May I see Respondent's Exhibit—

The Court: You may do that. Mr. Martin, what is the number of the so-called Port of Embarkation pier? The pier known as the Port of Embarkation during World War II, what is the number of that pier, if you know?

A. Pier 39, I believe, your Honor. [126]

The Court: You may inquire.

Mr. Morrow: May I see both exhibits, please?

The Court: That will be done.

Mr. Morrow: Respondent's Exhibit No. A-1 and Libellant's Exhibit No. 2.

(The exhibits were handed to Mr. Morrow.)

Cross Examination

Q. (By Mr. Morrow): Referring you to Libellant's Exhibit 2, does this show the actual height of the water hourly between the hours of 1200 and 1600 on March 21, 1955 at the Colman Dock?

A. Yes, sir, it does, on the hour.

Q. The height would be approximately the same at these hours at Pier 64, would it?

A. I believe by the proximity of the piers that the height would be essentially the same.

Q. Does this indicate a period of flood tide?

A. Yes, sir, I believe it will.

Q. And in order to determine the actual depths from the level of the water to the bottom you would

(Testimony of William M. Martin.)

add your soundings on the chart to the depth of water indicated hereon, would you?

A. In order to determine the depth of water as shown on the chart at any particular stage of the tide you must [127] add the stage of tide.

Q. Now, what is 1500 in standard time?

A. 1500 in standard time would be 3:00 p.m.

Q. And the exhibit shows 9.3 feet opposite 1500, which would be 3:00 p.m. standard time. Now, to get the actual depth of the bottom you would add the 9.3 to the soundings as indicated on the chart, would you? A. That is correct.

Q. For example, if you had a 180 feet sounding on the chart, Mr. Martin, to get the actual depth you would add 9.3 to that?

A. That is correct.

Q. That would then give you 189.3?

A. I believe you're right.

Q. Using the 180 on the chart, would it?

A. I believe that would be right.

Q. Now with reference to 1600, what time is that in standard time?

A. 1600 is 4:00 p.m.

Q. And there is indicated a height of feet of 8.7, and would it likewise be true that you would add 8.7 to determine the actual depth of the bottom? A. That is correct.

Q. At 1600 or 4:00 p.m. Seattle time?

A. That is correct. [128]

Q. Now, referring you to Respondent's Exhibit A-1 and your testimony that the cable area is

(Testimony of William M. Martin.)

marked by two red lines, the northerly boundary of the cable area extends out from the pier head of the south side of Pier 58, does it not?

A. I believe that's right.

(Respondent's Exhibit A-1 was handed to the witness.)

Q. Now would you please give me the following distances: The distance from the sea wall at the outside of Pier 58 to the westerly end of the line marking the northerly cable boundary.

A. I believe that would be approximately 580 yards, from the sea wall.

Q. Very well. Now would you give me the distance along the same northerly boundary from the pier head of Pier 58 to the westerly end of the northerly boundary?

A. That would be approximately 420 yards, possibly slightly more.

Q. 420 is as accurate as you can measure it?

A. Approximately, yes.

The Court: From what point to what point, please?

A. From the pier head line of Pier 58.

The Court: What is the pier head line? [129]

A. That's the outer limit of the——

The Court: Is that the farthest building inch of space on which an object could rest on the farthest seaward end of that pier?

A. That is my belief.

The Court: And the distance from that point westerly, is it, into the bay?

(Testimony of William M. Martin.)

A. Westerly into the bay.

The Court: Is how far?

A. Approximately 420 yards.

The Court: What is the difference between that point and the 450 yards distance you stated originally as to 57? Is there any difference other than the fact that the distance is the same at Pier 58 as it was in the relative distance as to Pier 57?

A. Due to the fact that the shoreline and the pier head lines are parallel and the shoreline runs in a northwesterly direction it would be necessarily further west.

The Court: Which is farther west, 57 or 58, the end of the piers out into the sound?

A. Pier 58, your Honor.

The Court: You may inquire.

Mr. Morrow: May I see the chart, please.

The Court: May I ask you, Mr. Martin, what [130] difference does that make so far as room for necessary or needful maneuvering to a ship trying to land at the dock in a rough March wind?

A. Your Honor, I'm not a mariner. I couldn't answer that question.

The Court: You may inquire.

Q. (By Mr. Morrow): Now would you just draw a pencil line between the cable area extending from the westerly end of the northerly cable boundary and the westerly end of the southern cable boundary? Just draw a pencil line there.

The Court: In this distance I suspect that this is developing into the same kind of a situation as

(Testimony of William M. Martin.)

all other situations involving paper exhibits and other exhibits do in every trial that I have presided over up to this time. We spend more time trying exhibits than we do in trying the factual issues. If we could just devote our time to asking the witness for his information based on an orally stated question and then let the record show his orally stated answer, then all of us could understand what he said without having to look at something and taking the responsibility of getting the same information and having in mind the same conditions which another viewer of the exhibit would have. We are supposed to all know and understand the same [131] English spoken words. If we could just have all this information stated in words or figures from the mouth of this witness it would be much more certainly understood by all. You may proceed.

Q. (By Mr. Morrow): Now, the line that you have drawn indicates the westerly boundary of the cable area, does it not?

A. It indicates——

Q. As marked on the chart?

A. That is correct, it does, as marked on the chart, though not necessarily the end of the cable area.

Q. That's right. Now, Mr. Martin, when you took your measurements in the first instance you took a measurement from the head of Pier 57 to the westerly end of the northern boundary as marked on the chart, didn't you?

(Testimony of William M. Martin.)

A. I took the distance from the westerly end of Pier 58 to the——

Q. Well, you did on my questioning, that's true, but I'm talking about on your direct examination.

A. No, sir, on the direct examination I did the same thing.

Q. Now, to do it correctly shouldn't you take the measurement on the perpendicular from Pier 57 to that line you have drawn on the chart?

A. If you were to get the distance from Pier 57, you're [132] correct.

Q. That's right. Now, would you do that?

A. That distance is somewhere approximately 440 to 450 yards from Pier 57. That is in a direct westerly line.

Mr. Morrow: May I see the exhibit, please.

(Respondent's Exhibit A-1 was handed to Mr. Morrow.)

A. That is the southern side of Pier 57.

The Court: State the limits of that distance again. A. 440 to 450 yards.

The Court: Between what points, the limits, the terminal points of the distance?

A. From the south side of Pier 57 to the westward limit of the cable area as shown on the chart is 440 to 450 yards.

Q. (By Mr. Morrow): 415? A. 450.

Q. Would you check that again, please?

The Court: You see here again you are devoting time to trying the chart. All the Court and all Counsel, I am sure, are interested in is having

(Testimony of William M. Martin.)

the Court advised as to what the distances are. You do not have to spend any time proving or unproving a map or an exhibit [133]

Mr. Morrow: No, but I want a correct interpretation of the witness' testimony.

The Court: The only reason why you need it is because there is a discussion of a thing that if it were not in the case at all you could go on avoiding it, you would not have to bother with the chart. All we want is the information.

(Respondent's Exhibit A-1 was handed to the witness.)

Q. (By Mr. Morrow): Now, what is the distance from the most westerly tip of Pier 57 to the westerly boundary of the cable area?

A. From the most westerly tip it would be something just over 420 yards.

Q. 420 yards is as accurate as you can measure it?

A. 420, 425. It's something a little bit more.

Q. Very well.

The Court: What are the terminal points in that distance measurement?

A. From the most westerly point, which would be the northwest——

The Court: Northwesterly point of what?

A. Of Pier 57, to the westward boundary of the cable area as shown on the chart.

Mr. Morrow: I would like this marked as an [134] exhibit.

The Court: Let it be marked.

(Testimony of William M. Martin.)

The Clerk: It will be Respondent's Exhibit A-2.

(U. S. Coast and Geodetic Survey Chart No. 6449 was marked Respondent's Exhibit No. A-2 for identification.)

Mr. Morrow: This is an exhibit produced during the pretrial conference.

The Court: Do you offer it in evidence?

Mr. Morrow: It was produced during the pretrial conference, isn't that right? Didn't you produce it?

Mr. Broz: It was produced, but it was not——

Mr. Morrow: That's all I said, it was produced.

The Court: Do you offer it in evidence?

Mr. Morrow: Yes, I want to offer it in evidence.

The Court: Is there any objection to it?

Mr. Broz: Yes, your Honor, at this time, until its relevancy is established.

The Court: You may proceed. It is another exhibit bearing the same number as does Exhibit A-1. In other words, it bears the C. and G. S. No. 6449. It has some colored shading at one place on the map. Proceed.

Q. (By Mr. Morrow): Is Respondent's Exhibit A-2 a chart [135] of the area in question corrected to March, 1955?

A. That's correct, Mr. Morrow.

Q. Basically, disregarding any markings on the two charts, they are identical, are they not?

A. I believe they are.

Q. And did you prepare this exhibit?

(Testimony of William M. Martin.)

A. I prepared the part which is not an integral part of the chart itself.

Q. That's what I mean. Did you put a 180 foot curve from soundings on this chart, Respondent's Exhibit A-2? A. Yes, sir, I did.

Mr. Morrow: I will offer the exhibit in evidence.

Mr. Broz: Objections, your Honor. The relevancy hasn't been established.

The Court: In what respect is it relevant?

Mr. Morrow: The relevance, your Honor, the evidence will show that the Princess Louise on the occasion in question in making a landing at Pier 64 dropped its starboard anchor to 30 fathoms, which is 180 feet, and this exhibit and this witness will testify as to the 180 foot curve of soundings as shown on the chart. Of course, it may be part of my case. I'm willing to withdraw the witness at this time and recall him later if that is desired.

The Court: That will be done. Is there any further cross examination you wish to ask of him?

Mr. Morrow: No. I would like to get this evidence in because it's going to be necessary in connection with further testimony. I will produce that evidence, and there is no question about it.

The Court: The Court will not change the procedure. The Court will not rule upon its admission until that further evidence is adduced.

Mr. Morrow: I will ask Mr. Martin to—or let me check for just a moment and see if I have finished the cross examination.

(Testimony of William M. Martin.)

The Court: You cannot do it until you have reached your case in chief.

Mr. Morrow: Yes. Very well, that's all the cross examination I have at this time.

The Court: You may step down.

(Witness excused.)

Mr. Morrow: Was this exhibit admitted or not?

The Court: No, the Court said it will not be admitted until we hear the further testimony which cannot be heard until we reach the respondent's case in chief. Call the libelant's next witness.

Mr. Broz: Sergeant Charles B. O'Brien.

The Court: Come forward, Mr. O'Brien, and be [137] sworn as a witness.

CHARLES B. O'BRIEN,

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Broz): State your name, address and occupation, please.

A. My name is Charles B. O'Brien, 3812 East Mercer Way, Mercer Island, Washington, and my occupation is the chief cost accountant for the Alaska Communication System, United States Army.

Q. What is your rank?

A. My rank is Sergeant First Class.

Q. What are your duties generally as chief cost accountant for the Alaska Communication System?

(Testimony of Charles B. O'Brien.)

A. Maintaining an accounting structure that will resemble and signify the cost of operations of the system as to maintenance and operation and the cost of all new construction and project work orders.

Q. Do you have any special qualifications for your position?

A. I have had twenty years experience in the accounting field, and this maintaining a high school education, in business I have finished a La Salle Extension University course in higher extension in CPA training and have [138] specialized in cost accounting as it pertains to public utilities, both as to the power and telephone.

Q. Have you worked on any special projects in your field?

A. Yes, I have. I have worked on several special problems in this field. I've worked on establishing rates, which we consider a rate study, for telephone and telegraph for the Alaska Communication System. I have worked on rates of interconnecting companies as to what charges will be charged to those, and then in addition to that have prepared manuals and written manuals pertaining to this type of work.

Q. Are those manuals used by the Alaska Communication System?

A. Yes, they are used by the Alaska Communication System both as to the general accounting aspect of it including the fixed assets and operating expenses and revenue and a performance

(Testimony of Charles B. O'Brien.)

basis, and on the separations procedure as to toll and exchange they are used by the independent companies within Alaska, and at the time it was prepared the Pacific Telephone & Telegraph Company here in Seattle asked permission to reproduce the charts that I prepared for incorporation within their own manuals.

Q. Were you acting in your capacity as chief cost accountant for the Alaska Communication System during the year 1955?

A. Yes, sir. [139]

Q. What projects were you engaged in with relation to your official duties during 1955?

A. I was engaged in the project of preparing the cost of all specific jobs and also the job pertaining to the cable break of the Fort Lawton-Seattle cable.

Q. When did you work on that particular project?

A. I worked on that particular project from the month of March to the completion of the data to be submitted to me, and the closing date of that accounting period was the 31st day of March, and——

The Court: What year, please?

A. 1955, sir.

The Court: So you began on what date in March?

A. This specific job began the 23rd of March, sir, 1955.

The Court: And it ended when?

(Testimony of Charles B. O'Brien.)

A. It ended the 29th day of March, 1955.

Mr. Broz: Mark this for identification, please.

The Clerk: It will be marked Libelant's Exhibit No. 3.

(A job order cost sheet was marked Libelant's Exhibit No. 3 for identification.)

Q. (By Mr. Broz): Mr. O'Brien, will you please examine what has been marked Libelant's Exhibit No. 3 for identification and state whether or not you recognize it? [140]

A. Yes, I do.

Q. What is it?

A. This is a job order cost of the cable break, the Seattle-Fort Lawton cable break.

Q. What date?

A. Inclusive 23rd and 29th March, 1955.

Q. Did you refer to it as a ledger?

A. Yes, sir, it's a job order ledger sheet.

Q. Was this ledger sheet prepared by you?

A. Yes, it was.

Q. Is it the original which was prepared by you? A. Yes, it is.

Q. Was this ledger sheet prepared in the regular course of business of Alaska Communication System? A. Yes, it is.

Q. And was it the type of record which was regularly produced by the Alaska Communication System in the regular course of business?

A. Yes, it was.

Q. Is this a government record?

(Testimony of Charles B. O'Brien.)

A. Yes, it is a government record.

Mr. Broz: I will offer the exhibit, may it please the Court.

Mr. Morrow: I object to the exhibit. It's in the nature of a secondary document, and for the [141] further reason that up to this time there has been no foundation for this type of testimony. There has been no evidence in the case at all that repairs were made. For the further reason that it is not obviously a record kept in the usual course of business but it was something that was prepared later in connection with a special job, and for the purpose probably for presenting a claim. Perhaps if original entries were introduced supporting the conclusions here I might not have any objection. It's the first time I've seen the document, and the fact that it isn't connected with any evidence showing repairs I think makes it highly objectionable at this time.

The Court: As I understand it it is an expert's analysis based upon certain fundamental basic information which this expert used in making up this, which fundamental supporting data is not now brought forward and with respect to which opposing Counsel is given the opportunity of cross examination. Where is that material and what is the need for this expert form of information for the benefit of the fact trier?

Q. (By Mr. Broz): Sergeant O'Brien, did you in the course of preparing that document have reference to other records of the government?

(Testimony of Charles B. O'Brien.)

A. In preparing this document, this is a basic accounting [142] document——

The Court: Just a minute. I am afraid you are not going to make a responsive answer. The question ought to be answered yes or no.

A. Yes.

Q. (By Mr. Broz): And are those records available to you now?

A. The source document is not available at this time.

Q. Why not?

A. And the reason for that being is being governed by Army regulations the source documents are not to be kept longer than one year, then they are to be destroyed and substituted therefor this permanent record which the accounting of the government accepts as essential.

Q. What is the purpose of that record?

The Court: Let it be made certain and very clear what is the fact now and not what may have been done at some other time. We wish the final information as to whether or not what was done usually was done in this case. The last two questions and answers do not sufficiently bring that out.

Q. (By Mr. Broz): Sergeant, at the time that you prepared that document did you have reference to other government records?

A. Yes, I did. [143]

Q. And how did you go about preparing this particular document?

A. This particular document was prepared from

(Testimony of Charles B. O'Brien.)

individual time sheets prepared and submitted by each individual on the Alaska Communication System, which included the submarine cable ship, the Basil O. Lenoir, and in addition to that we had subsistence documents which came from the ship, and I personally went aboard the ship and went over their records as to materials used in this specific job.

Q. Does that document before you represent a summary of the information which you gathered from these other documents?

A. Yes, it does.

Q. And are those other documents now destroyed? A. Yes, they are.

Q. They are no longer available to you in any way, shape or form? A. They are not.

Q. And when was that document prepared?

A. This document was prepared the 4th of June of 1955.

Q. And has it been in your custody since that time? A. Yes, it has.

Q. And are you the custodian of that document now? A. Yes, I am. [144]

The Court: It would be competent to ascertain for what purpose it was made.

Mr. Broz: Yes, your Honor.

The Court: And in particular upon a proper form of question whether or not at the time it came into being it did then and there become an official record and, if so, what with reference to its being or not being an official record has been done with

(Testimony of Charles B. O'Brien.)

it with respect to use and custody since then until now.

Q. (By Mr. Broz): For what purpose was the record made?

A. The record was made——

The Court: You are talking about this Exhibit 3, are you, Libellant's Exhibit 3?

A. Yes, sir. This record was made in our regular course of business, which in the cost accounting——

Mr. Morrow: Objected to as not responsive.

Mr. Broz: He hasn't finished yet.

The Court: The objection is overruled. I wish he could be given an opportunity to say when he did that. Of course he cannot say everything in one word.

Q. (By Mr. Broz): When did you prepare that document, Sergeant?

A. I prepared this document during the month of May.

Q. Which year? [145] A. 1955.

Q. What was done with it after you prepared it?

A. After I had prepared this document—we maintain this particular type of ledger sheet in a special ledger, and that is called our plant work order and new construction ledger. At that time when a project is complete, a job, we decide at that time on an analysis whether this is a capital expenditure or a revenue expenditure.

The Court: Wait just a minute.

A. If it is——

The Court: Go ahead, finish your statement.

(Testimony of Charles B. O'Brien.)

A. If it is a revenue expenditure, then we transfer this amount of the job to our operating expenses for the Alaska Communication System, which this job was transferred to our operating expenses at that time.

Q. (By Mr. Broz): This was carried, the summary was carried as an operating expense of the Alaska Communication System at that time?

A. It was incorporated into the operating expenses at that time.

The Court: I do not understand. That question and answer are not clear to the Court. Read the question.

(The reporter read the last question.)

The Court: Do you mean the making of this thing which is here as Libelant's Exhibit 3, is that [146] what you mean, Counsel?

Mr. Broz: No, your Honor.

The Court: State a question so the record, not only what Counsel has in mind, but the record will show a true and accurate reflection of what is meant.

Q. (By Mr. Broz): What use was made of this record after you prepared it in 1955, Sergeant? What ultimate use was made of the record?

A. This record was maintained so we could show from our records the cost of doing a specific job in reference to a repair item of the cable ship Basil O. Lenoir.

Q. And was this specific document an official record of the Alaska Communication System?

(Testimony of Charles B. O'Brien.)

A. Yes, it was.

Q. And is it maintained as such at this time?

A. It is maintained as such as of this date because we have other records and other jobs of the same nature.

The Court: The witness way back in his testimony since being interrogated about the authentication of this document said that as soon as the project was completed, and I asked what project he meant when he said those words or in substance used those words, does he mean the cost studies that he made or the studies of the costs of making these repairs, or does he mean the project of doing the repairs, accomplishing them [147] after the studies had been made.

Q. (By Mr. Broz): What do you refer to, Sergeant, when you use the terminology "project," "when the project was completed"? What do you refer to?

A. I refer to a job that is being done——

The Court: What is the job here?

A. The job is the repair to the Fort Lawton submarine cable job. When that job was completed——

The Court: Was it completed?

A. Yes, sir.

The Court: When?

A. It was completed on the 29th day of March, 1955.

The Court: I still am not certain whether the witness at the time he used the words that the

(Testimony of Charles B. O'Brien.)

Court felt in doubt as to the meaning of, I still am in doubt as to whether he meant the project of making up this cost study or the project which was undertaken by a contractor or a series of contractors to make repairs which were necessitated, if they were, by the damaged cable in question.

Q. (By Mr. Broz): Sergeant, when did you make that record?

A. This record was posted from the source documents in the month of May of 1955.

Q. And is that with reference to the Seattle-Fort Lawton [148] submarine cable repair job in 1955?

A. Yes, it is.

Q. Was that record completed after the job which you referred to, the cable repair itself, was effected?

A. This record was completed after the job had been completed.

Q. And what does the record reflect?

A. The record reflects the cost of the repair of the Fort Lawton-Seattle submarine cable during the period of 23 to 29 March 1955.

Q. From other source records?

A. Yes, sir.

Q. And are those other source records available now?

A. No, sir.

Mr. Broz: I'll offer the exhibit, your Honor.

Mr. Morrow: I would like some voir dire.

The Court: No, the Court declines to extend that. Do you have any objection to the offer?

Mr. Morrow: Well, I would like to——

(Testimony of Charles B. O'Brien.)

The Court: We have spent so much time on this and the Court is ready to rule upon it. The Court feels that enough has been said for the Court to intelligently rule upon it, and that does not mean the Court is going to admit it, it just means that I think I am able to rule upon it, that is all it means. The [149] Court declines to extend the opportunity of voir dire and advises Counsel offering it that the Court thinks that this illustrates what the Court has said here before this morning, that we spend in a situation like this a lot more time than the thing is worth. All you need to do is ask this witness for his information to be stated orally as to what these costs of repairs would be if he has any opinion or information regarding it if it is competent evidence, and after he gets all through, if there is anything further needed to further demonstrate or illustrate his testimony, possibly this exhibit might illustrate something he said and it might be admissible as illustrative and for the purpose only of characterizing his testimony when it could not possibly be introduced in evidence or received in evidence as independent and direct evidence of the things contained therein.

At this time we will take about a ten minute recess.

(Short recess.)

The Court: You may proceed.

Q. (By Mr. Broz): Sergeant O'Brien, in the course of your official duties did you conduct a cost analysis of the Seattle-Fort Lawton cable re-

(Testimony of Charles B. O'Brien.)

pair job in March of 1955? A. Yes, I did.

Q. Describe briefly what you did in preparing your cost analysis of the repair job.

A. In preparing the cost analysis of the Seattle-Fort Lawton break we accumulated the costs of labor from individual time sheets. I personally went down to the cable ship——

The Court: Counsel, may I tell you that I do not care a thing about this thing until I hear some evidence from this witness as to what the fact is. If this witness found any facts which he recorded in this exhibit, why is it that he cannot testify directly as to his knowledge now by word of mouth?

Q. (By Mr. Broz): What facts did you find, Sergeant O'Brien——

The Court: Just ask him something about the facts.

Q. (By Mr. Broz): Did you prepare a cost analysis of the Seattle-Fort Lawton cable repair job in 1955? A. Yes, I did.

Q. And in the course of your preparation of that cost analysis did you find certain facts which were included in your cost analysis?

A. Yes, I did.

Q. What did you find with regard to the cost analysis preparation of this repair job?

Mr. Morrow: Objected to on the ground that [151] the question calls for hearsay evidence.

The Court: The objection is overruled.

A. I found that the cost of the repair of the Seattle-Fort Lawton submarine cable amounted to

(Testimony of Charles B. O'Brien.)

\$6,954.23 direct cost, this being compiled from the—

The Court: Just a minute. There is nothing before you. Ask him another question.

Q. (By Mr. Broz): How was that figure arrived at, Sergeant?

A. That figure was arrived at from labor records, the ship's records, which I personally went down and audited on the job, and subsistence that was aboard the ship, in arriving at this figure. These are direct costs only.

Mr. Morrow: Objected to and move that it be stricken on the ground that it's not the best evidence.

The Court: Overruled and denied.

Q. (By Mr. Broz): After arriving at the figure of \$6,954.23 what did you do with that figure?

A. I transferred that figure to the expense ledger for the Alaska Communication under the account Repairs to Submarine Cable.

Q. What was done with that?

The Court: Does that have an exhibit number in this case, that thing you last referred to? Read his answer and see if it will remind him of the thing the Court is referring to. [152]

(The reporter read the last answer.)

The Court: The expense ledger, has that thing been marked as an exhibit with an exhibit number, Mr. O'Brien, in this case? A. No, sir.

The Court: Proceed.

Q. (By Mr. Broz): Is that the document that

(Testimony of Charles B. O'Brien.)

has been previously handed to you and described as Libelant's Exhibit No. 3?

A. Yes, it is.

Q. What was the purpose of your transferring that figure to that record?

A. The purpose of transferring it is that this is a maintenance item and not a capital item.

Q. Is it an official record?

A. Yes, it is.

Q. Is it an official record of the Alaska Communication System? A. Yes, it is.

Q. Does it appear as a direct charge against the Alaska Communication System operational account for the year 1955? A. Yes, it is.

Mr. Broz: I'll reoffer the exhibit.

Mr. Morrow: The same objection. [53]

The Court: The objection is overruled. Libelant's Exhibit 3 is now admitted.

(Libelant's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. Broz): Have you had an occasion to prepare a cost analysis representing the cost of operation of the cable ship Lenoir?

A. Yes, I have.

Q. For what purpose did you conduct that cost analysis?

A. I conducted that cost analysis to arrive at a daily charter figure if and when the vessel was to be leased to other governmental agencies or commercial concerns.

Q. When did you prepare that cost analysis?

(Testimony of Charles B. O'Brien.)

A. I prepared that cost analysis in November of 1954.

Q. And did you arrive at a daily operational cost of the vessel? A. Yes, I did.

Q. What was that figure?

A. That figure was \$1,500 a day.

Q. Do you know whether the Lenoir was subsequently chartered on the basis of your cost analysis? A. Yes, I do.

Mr. Morrow: Objected to as immaterial.

Mr. Broz: It will be related at a later time.

Mr. Morrow: As to whether they chartered the [154] vessel at that figure.

The Court: Did you hear the statement of the promise?

Mr. Morrow: Yes, your Honor, but that subsequent chartering of the Basil Lenoir to another party could not possibly establish the reasonable charter rate for the vessel.

The Court: I do not hear a question that calls for him to state the information objected to. The objection is overruled. I understood the question related to some kind of a record.

Q. (By Mr. Broz): In arriving at the daily operating expense of the cable ship Lenoir did you include any other item in arriving at that computation other than items of cost?

A. No, sir.

Q. Did you include an item of profit?

A. No, sir.

The Court: Would Counsel remind the Court of

(Testimony of Charles B. O'Brien.)

the use he intended to have made as evidence of the \$1,500 information that you asked this witness about a moment ago? Are you seeking to authenticate a document for admission in evidence or in mentioning the sum of \$1,500 did you do so in connection whereby you wished to adduce direct information of a recoverable item of [155] damages in this case?

Mr. Broz: Your Honor, the witness' testimony was sought simply to elicit that he did prepare a cost analysis in 1954 and did arrive at the operating value of the vessel through his cost analysis. Other witnesses will testify that the vessel was subsequently chartered on the basis of that cost analysis which was made in 1954.

The Court: Did he mention the sum which he determined?

Mr. Broz: I believe he did.

Mr. Mikkelsen: He did.

Mr. Broz: He did, your Honor, \$1,500.

The Court: I think the Court should not hear that until we find out what sources of information he considered without giving what the information was, the sources and the nature of the information and the extent of it, and so the Court is advising Counsel on both sides that the Court will give no consideration to any sum of \$1,500 unless and until it is substantiated by another question and another answer propounded to this witness after and only after this witness has been qualified properly to give that information.

(Testimony of Charles B. O'Brien.)

Mr. Broz: Very well, your Honor.

Q. (By Mr. Broz): Sergeant O'Brien, did you arrive at a [156] daily operational cost of the cable ship Basil O Lenoir? A. Yes, I did.

Q. When did you compute that cost?

A. I computed that in November of 1954.

Q. Did you work on that subsequently?

A. Yes, I did.

Q. Will you describe your accounting procedure in arriving at the figures that you did in your cost analysis?

A. The elements that were considered in arriving at this daily cost was the labor of the ship at full complement, the fuel used, the subsistence used, the supplies and materials, expendable supplies and materials used aboard the ship to operate it.

Q. What was the source of your information?

Mr. Morrow: May I have that answer back again, please.

The Court: It will be given. It will be read by the reporter.

(The reporter read the last answer.)

The Court: You may proceed with another question.

Q. (By Mr. Broz): Was this particular cost analysis performed in the regular course of your duties? A. Yes, it was.

Q. For what purpose? [157]

A. It was prepared on the basis that I had been notified——

The Court: No, no, for what purpose.

(Testimony of Charles B. O'Brien.)

A. For subsequent charter of the vessel.

Q. (By Mr. Broz): Were you ordered to prepare such a report? A. Yes, I was.

Q. By whom?

A. By the commanding officer.

Q. What was the source of the information which you used in arriving at the daily operational cost of the cable ship? What was the source of the information which you used in arriving at that determination?

A. The source was the labor to operate the vessel while it was——

Q. How did you get those figures?

A. I arrived at those figures by our individual time sheets, by the materials——

The Court: No, did you talk to anybody to get that information?

A. I personally made visits——

The Court: Just answer yes or no.

A. Yes.

The Court: Did you read a book or study any materials that were expected to be consumed in performing the service involved in the charter rate or value of the vessel? [158]

A. Yes.

The Court: Ask him what else he did.

Q. (By Mr. Broz): Did you——

Mr. Morrow: Your Honor, I would like to make an objection and a motion.

The Court: You may make the objection now.

Mr. Morrow: I would like to object to any

(Testimony of Charles B. O'Brien.)

further inquiry as to operational costs of the vessel prepared in 1954 as being irrelevant and immaterial to any damages sustained in 1955 and move that the witness' testimony in respect to the operational costs of 1954 be stricken.

The Court: What response do you make to that?

Mr. Broz: The witness has already stated that he worked on the report after 1954 and 1955.

The Court: What have you to state as a direct reason for the materiality of a 1954 situation with respect to this situation here in 1955?

Mr. Broz: If it please the Court, the evidence will show that this vessel of which the cost analysis was made was subsequently chartered in 1956 on the basis of the figures which were computed in 1954, worked on in 1955 and verified in 1956.

The Court: Do you promise to or do you not promise to show that the information regarding the [159] situation in 1954 will be related to the situation here involved and will be established to be the same?

Mr. Broz: The Governments expects to do so, your Honor.

The Court: The objection is overruled and the motion is denied, and if it is not done, if the promise is not performed, you may renew the objection and motion.

Q. (By Mr. Broz): Did you have access to other records in arriving at the figures which were utilized in preparing your cost analysis?

A. Yes, I did.

(Testimony of Charles B. O'Brien.)

Q. What records were those?

A. Those were the ship's records and shipping documents and travel orders coming through my office in the normal operation.

Q. Did you receive that information in the regular course of your duties?

A. Yes, I did.

Q. Where did you go in preparing this cost analysis? Did you visit particular offices or the cable ship itself?

A. Yes, I did. I visited the cable ship itself, I visited the plant and engineering office, I also visited the General Counsel's office and the procurement and distribution, which is a supply activity within the Army, and my own office and records down there in computing this [160] daily cost.

Q. And what information did you receive as the result of your visits to these various offices and places?

A. The information that I had received from those offices is the verification of the computed cost, daily cost of operating the ship and their scrutinizing those figures to the best of their ability on the operation of the ship.

Q. When did you start this cost analysis, this particular cost analysis?

The Court: One specificity that the Court has in mind suggesting that Counsel should have in mind is one that might be properly illustrated by this: If he was trying to ascertain in this cost study

(Testimony of Charles B. O'Brien.)

for the purpose of forming an opinion whether this charter party was based upon in part certain cost items, such as fuel oil or fuel consumption, it might be related to this kind of a situation. If he was investigating the cost of bicycles on a certain day or some other common merchandise article he might be asked such a question as might elicit the information that he consulted among other things a Sears, Roebuck catalogue.

What the Court needs to know in order to qualify this witness' finding on this matter is what specific sources of information came to his attention [161] and were considered by him in forming his conclusion.

I do not see what else I can say. It is a common thing, it is inherent in a study of any kind, the results of which can be adduced properly as testimony in a trial in court. Proceed.

Q. (By Mr. Broz): Sergeant O'Brien, what items did you take into considering in arriving at the daily operational cost of the cable repair ship?

A. The items that was considered are the items to operate this ship in a normal course of one day.

Q. Do you recall offhand what some of those items were?

A. Some of those items are the labor involved, the subsistence, the fuel oil, the lube oil——

The Court: Whom did you talk to or what did you see in the way of written data about that labor cost?

A. We computed the labor cost and we have

(Testimony of Charles B. O'Brien.)

past information recorded on our ledger for a yearly operating cost of the ship which we referred to.

The Court: There must have been something that you looked at or some person you talked to about that labor item. Who and what was it?

A. The labor is submitted by each individual and we compute and extend the hours——

The Court: What individuals?

A. The individuals of the cable ship. [162]

The Court: Do you mean the persons in the crew of the cable ship or the paymaster on the cable ship that pays the wages? What do you mean?

A. Individuals employed on the cable ship for labor submit a semimonthly individual labor record to the cost accounting section for labor expended on the cable ship.

The Court: That does not say a thing, Mr. Broz, and this is the last suggestion that I am going to make in the matter. The witness does not directly give any information. The tendency of the witness is to make comments which are not direct answers to direct questions, and over these objections the Court will have to have a greater specification of the information. The Court will have to be at recess from a quarter before 12:00 until a quarter before 2:00. You may proceed.

Q. (By Mr. Broz): Sergeant O'Brien, with regard to labor as an item which you took into consideration in arriving at the cost analysis figures,

(Testimony of Charles B. O'Brien.)

you took into consideration the cost of labor, is that correct? A. Yes.

Q. And did you receive certain records, documents which you used in arriving at the cost of the labor which you attributed to the operation of the Basil O. Lenoir? [163] A. Yes.

Q. And where did you get those records?

A. From published hourly rates that we applied to the individual time sheets submitted by the individuals on the cable ship Lenoir.

The Court: As far as the witness' answer is concerned they might have been published by the Labor Department of the United States Government or they might have been published by the paymaster on board that vessel. It would be very interesting to know which, for instance.

Q. (By Mr. Broz): What published documents did you refer to, Sergeant?

A. The maritime rate.

The Court: That still does not say a thing in the world. I am going to withdraw this witness from the stand if he does not become more informative and direct in his answers. The Court will not be willing to indulge any substantial further time to a witness who refuses or in some manner circumvents the questions.

Q. (By Mr. Broz): Sergeant, when you refer to the maritime rate, what document do you refer to?

(Testimony of Charles B. O'Brien.)

A. I refer to the published rates within the ACS for the cable ship Lenoir.

Q. Is that information furnished you in connection with your official duties? [164]

A. Yes, it is.

Q. Do you know where those figures are arrived at? Do you know from where they are derived?

A. They are derived from the Wage Board of the Civil Service Commission.

Q. Did you examine the time sheets submitted by the employees of the ACS on the Basil O. Lenoir? A. Yes.

Q. Were they likewise furnished to you in the regular course of your duties?

A. Yes, they were.

Q. And did you later arrive at a figure using the maritime rate and the hourly record of employment of the employees on the Basil O. Lenoir?

A. Yes, I did.

Q. What other items did you use in the computation of your cost analysis?

A. I used the subsistence that would be furnished the ship when it was out.

Q. What do you refer to by "subsistence"?

A. Food.

Q. What was the source of your information regarding the food?

A. That was obtained from the ship's records.

Q. What ship records do you refer to? [165]

A. The Basil O. Lenoir ship records.

(Testimony of Charles B. O'Brien.)

Q. The log? A. Yes.

Q. Did you take into account the fuel oil consumption of the Lenoir? A. Yes, I did.

Q. Did you have access to records regarding fuel oil consumption? A. Yes, I did.

Q. What records did you refer to?

A. The ship's logs.

Q. Did the ship's logs relate the cost of the fuel oil to the vessel?

A. Yes, it did.

Q. Was that a chargeout likewise to the Alaska Communication System? A. Yes, it was.

Q. What other items did you take into consideration?

A. The expendable supplies aboard that ship.

Q. And what were expendable supplies?

A. Such as what they would use in the normal course, rags, tapes, and so forth, that they would need to maintain and operate the ship.

Q. And where did you get that information?

A. That came from the ship's supply records.

Q. What other information did you use in arriving at this computation?

A. That is all the information that was used.

The Court: At this time we will be at recess until 1:45, a quarter before 2:00 o'clock. Court is recessed until that time.

(Thereupon, at 11:45 o'clock a.m. a recess herein was taken until 2:00 o'clock p.m.)

(Testimony of Charles B. O'Brien.)

Wednesday, August 20, 1958, 1:45 o'clock p.m.

(All parties present as before.)

The Court: All are present. You may proceed.

Q. (By Mr. Broz): Sergeant O'Brien, again with reference to your cost analysis of the daily operational cost of the Lenoir in 1954, what items did you consider in your cost analysis?

A. I considered the items of labor, and in reference to labor it was the manning table which went to make up the ship's complement.

Q. Just list the various items that you considered, Sergeant, the labor——

A. The various items that I considered was labor [167] subsistence, fuel oil, expendable supplies, depreciation.

Q. Did you consider dry-docking and repairs?

A. And the dry-docking and repair part of the cable ship.

Q. And the laundry?

A. And the laundry.

Q. With reference to the item of labor, what did you do to compute the cost of labor in your cost analysis?

The Court: Or more particularly what did you do, if anything, to inform yourself regarding that item as an item of cost? That is the proper inquiry, so as to acquaint the opposing litigant and the Court with the kind of information regarding the carefulness or non-carefulness of his investigation.

(Testimony of Charles B. O'Brien.)

Q. (By Mr. Broz): What did you do to inform yourself of the cost of labor?

A. I obtained the manning table and had that in my possession——

Q. The manning table from where?

A. From the personnel office of the Alaska Communication System, which told how many people were aboard the vessel, would be aboard the vessel, and what types of positions they would fill, such as the master, first engineer, second engineer, deck hands, firemen and cable splicers. After receiving that I had in my possession—— [168]

The Court: Did you ascertain or did you not ascertain their labor scale?

A. I was coming to that, your Honor. At that time I obtained the wage schedule of these various types of labor aboard the cable ship Lenoir.

Q. (By Mr. Broz): From where?

A. From the Civil Service Commission on the wage board employees of maritime within the Northwest, which listed the hourly rate of these people who go to make up the ship's crew of the Lenoir. From that I computed the hourly rate on a yearly basis. Also, using historical cost factors since the year 1951 to the operation of the ship in regards to labor.

Q. And what did you do with that information once you received it?

A. Once I had received it I computed that information on a daily cost of labor on that ship.

(Testimony of Charles B. O'Brien.)

Q. With reference to the item of fuel, what did you do to inform yourself as to the cost of fuel?

A. I went personally down to the cable ship Basil O Lenior and talked with Captain Bowen, who directed me to the ship's records, and obtained from those records the fuel consumed of that ship over the past year.

Q. Was that taken from an official record of the Alaska Communication System? [169]

A. That was taken from the official record of the cable ship Lenoir, and also at that time I personally viewed the ship's log with Captain Bowen and computed the amount of fuel and obtained the unit cost of that fuel from the vouchers paid by the Alaska Communication System from the oil companies.

Q. With reference to the item described by you as expendable items, what do those items include?

A. Those items would include such items as lube oil, grease, rags, and so forth, that lose their identity in the operation of the ship. This was obtained by historical cost data of previous operation of the ship. Also in going over the ship's record, permanent record as to what they had used the past year. This was computed since 1951 on a yearly basis and then averaged out to a daily cost.

Q. Did you obtain that information, the cost information, the historical data, from the records of the Alaska Communication System?

A. I obtained them from the records of the

(Testimony of Charles B. O'Brien.)

Alaska Communication System in reference to the cost of operation of the cable ship Lenoir.

Q. Well, with reference to the item of dry-docking and repairs, what did you do to inform yourself as to the cost of dry-docking and repairs?

A. On the dry-docking and repair was my personal knowledge of the estimated cost—not the estimated cost but the routine dry-docking and repair of the ship over the years since 1951. That is also——

Q. Did these records refer specifically to the Lenoir?

A. These records refer specifically to the Lenoir which are taken into cost account records of the Alaska Communication System, and I made an analysis of that and averaged it out on a daily basis.

Q. With respect to the item of laundry, what did you do to inform yourself as to the cost of that item in your cost analysis?

A. I used the historical cost figures of the Alaska Communication System from the year 1951 through 1955 and developed an average daily cost of laundry in operating that cable ship Lenoir.

Q. Did the historical data that you obtained come from the official records of the Alaska Communication System? A. Yes, sir.

Q. Did they refer specifically to the cable ship Lenoir?

A. These referred specifically and were so identified as records of the cable ship Lenoir.

(Testimony of Charles B. O'Brien.)

Q. With reference to the item of subsistence, what did you do to inform yourself as to the item of subsistence in the cost analysis which you prepared? [171]

A. We obtained the historical——

The Court: Of what persons?

Q. (By Mr. Broz): To what did the item of subsistence in your cost analysis relate?

A. It related to the food supplied the crew aboard the cable ship *Lenoir*. That figure was obtained from the historical cost records of the Alaska Communication System since 1951 and were averaged out on a daily basis of the ship's operation.

Q. During which period of time did you conduct this particular cost analysis?

A. This particular cost analysis was conducted specifically with the idea of developing a daily cost. It was originated in October of 1954 and was completed in November of 1954.

Q. Did you prepare any subsequent cost analysis with reference to this particular vessel?

A. Yes, sir.

Q. And when was that?

A. That was in May of 1955.

Q. Did you follow the same procedure as you have previously described with reference to the first cost analysis?

A. Yes, sir.

Q. Did you arrive at a daily operational cost figure based on your cost accounting for the quarter ending in April of 1955 [172]

(Testimony of Charles B. O'Brien.)

A. Yes, I did, I arrived at a daily cost figure and at the end of April of 1955.

Q. What was that figure?

A. And that figure was \$1,500.

Q. And what did that figure represent?

A. That represented a daily cost of operation of the cable ship Basil O Lenoir.

Q. Based on the items which you have previously testified to? A. Yes, sir.

Q. Did that cost figure include any item of profit or loss? A. No, sir, it did not.

Q. The report which you completed covering the quarter ending in April of 1955, to what period did that particular cost analysis relate?

A. That period covered from the time of the original study in October of 1954, it preceded and was reviewed each month's operation of the cable ship Lenoir.

Q. Was that procedure followed thereafter?

A. Yes, sir, and it's still in effect.

Q. Are these cost analyses reviewed monthly?

A. Yes, sir, they are, they are reviewed every month.

The Court: What do you do with the records of them, if anything? [173]

A. The records of them are submitted to the comptroller of the Alaska Communication System on a monthly basis, sir.

The Court: Do you keep any copies of them in the local files of the officer having them made, your

(Testimony of Charles B. O'Brien.)

files or the files that are maintained locally in connection with your studies of this kind?

A. Yes, sir, they are.

The Court: Was this particular exhibit or any copy of it so kept?

A. Yes, sir, it was.

The Court: You may proceed.

Mr. Broz: You may inquire.

The Court: You may cross examine.

Mr. Morrow: I wish to first of all move that the witness' testimony in respect to the computation in question which appears to be a written analysis be stricken on the ground it's not the best evidence.

The Court: The Court has received it as a summarized statement of the information obtained and testified to regarding the studies and conclusions as to information given from the witness stand by this witness, an expert witness in the field of cost accounting, in this case.

Mr. Morrow: I have reference—— [174]

The Court: In this case orally stated.

Mr. Morrow: I have reference to the computation of an average daily cost. There is no exhibit on file in connection with any of those costs, and I——

The Court: I understood that Libelant's Exhibit 3 was a summarized statement which was based upon various informational bases, and that these various sources of information, like labor and fuel and laundry and the expenses of operating that

(Testimony of Charles B. O'Brien.)

ship, were items that went into this study which as I understand it is Libelant's Exhibit No. 3.

Mr. Morrow: Well, I'll ask the witness.

Cross Examination

Q. (By Mr. Morrow): Sergeant O'Brien——

The Court: What I am informed is Libelant's Exhibit 3 I hold in my hand, and Counsel may have access to it.

Mr. Morrow: Yes, I had that in mind, your Honor.

(Libelant's Exhibit No. 3 was handed to Mr. Morrow.)

Q. (By Mr. Morrow): Is it Sergeant Grime?

A. O'Brien, sir. [175]

Q. O'Brien. I'm sorry. Sergeant O'Brien, in reference to your testimony in respect to the average daily costs which you computed to be \$1,500 over a period from 1951 to 1955, is that reflected in Libelant's Exhibit 3?

A. In Exhibit 3, sir, is the direct cost of the submarine cable break between Seattle and Fort Lawton.

Q. Your answer then is no, is it not?

A. The answer is a direct cost. It is not the \$1,500.

Mr. Morrow: Would you please read the question back.

Q. (By Mr. Morrow): And will you please, Sergeant O'Brien, listen to the question and answer the question.

(Testimony of Charles B. O'Brien.)

(The reporter read the question beginning
Line 1, this page.)

A. No, sir.

Q. Thank you.

The Court: Is any part of it reflected in that exhibit?

A. The direct part of the repair of the cable is reflected there, sir.

Mr. Morrow: Now, may it please the Court, the witness has not answered the Court's question. I wonder if we could have it read back.

The Court: You may.

Mr. Morrow: It can be answered yes or no, [176] and the witness should answer it.

The Court: Read the question of the Court, Mr. Reporter.

(The reporter read the Court's question as follows:

"Is any part of it reflected in that exhibit?")

A. Yes.

Q. (By Mr. Morrow): Well, now, will you point out—as I understood your testimony, Libelant's Exhibit 3 reflects the direct cost during the period and referring to only the cable repair between March 23rd and March 29th. Isn't that correct?

A. Yes, sir.

Q. Now you have answered once that this does not, Libelant's Exhibit 3 does not reflect the information in respect to your analysis between 1951 and 1954, isn't that so?

A. May I have the question read again, please?

(Testimony of Charles B. O'Brien.)

Q. Well, I'll restate it.

A. All right, sir.

Q. The Court has asked you if Libelant's Exhibit 3 reflects any information upon which you based your analysis to determine an average daily cost between the years 1951 and 1954. Now what is your answer?

A. If it reflects any of that part in there, in the exhibit? [177]

The Court: Let him see the exhibit.

(Libelant's Exhibit No. 3 was handed to the witness.)

A. May I have your question read, please?

The Court: It will now be read again.

(The reporter read the question as follows:

"Q. The Court has asked you if Libelant's Exhibit 3 reflects any information upon which you based your analysis to determine an average daily cost between the years 1951 and 1954. Now what is your answer?")

A. The answer to that question would be, in using any cost developed over the period——

Q. (By Mr. Morrow): Now, can't you answer that yes or no?

The Court: Just a moment. The Court strikes the Court's ruling admitting Libelant's Exhibit 3 heretofore and advises Counsel on both sides that I have not seen a single fact or a single figure reflected therefrom and I know nothing about what is in it up to this time, and the Court has not and will not give it any consideration. If the witness

(Testimony of Charles B. O'Brien.)

has stated orally any information, the Court will consider that in connection with this case, and you may disregard what the Court said in connection with the ruling or the overruling of [178] any objections stated subsequent to the former admission of it in evidence.

(Libelant's Exhibit No. 3 was rejected.)

The Court: You may proceed.

Mr. Morrow: May I inquire, your Honor, what the status of Libelant's Exhibit 3 is?

The Court: The status is that it is not admitted. The objection to Libelant's Exhibit 3 is sustained. The witness has been orally interrogated and has orally answered regarding the things that he has done, but as far as this exhibit and anything it shows the Court has not and will not consider it, unless it is later admitted.

Q. (By Mr. Morrow): Sergeant O'Brien, you concluded that the cost of repair, the direct cost of repair for the repairs of the Fort Lawton-Seattle submarine cable in 1955, the month of March, was \$6,954.23, is that correct? A. That's correct.

Q. Now, what part of that figure, if any, referred to depreciation of the barge?

A. Referred to depreciation of the barge, was \$504.

Q. Now, depreciation is not a direct cost item, is it?

A. That is considered as part of a fixed charge.

Q. That's right. [179]

A. That's a fixed charge of an operational cost.

(Testimony of Charles B. O'Brien.)

Q. But depreciation is not a direct cost item, is it?

The Court: Do you mean out of pocket expense?

Q. (By Mr. Morrow): Out of pocket expense.

A. It is not out of pocket expense.

Q. In other words, the depreciation in respect to the cable ship Lenoir continues whether or not she is making repairs or not, isn't that so?

A. It continues whether it is or it isn't.

Q. Right. A. But if it is working——

Q. Now, did you also have in that total figure an item in mind of \$188.20 or 15 per cent charged for overhead? A. Yes.

Q. That again is not a direct or out of pocket item, is it? A. Yes, it is.

Q. Well, how do you figure that?

A. Because that takes into consideration, the 15 per cent overhead here takes into consideration the accounting personnel and the personnel office processing the records of these people.

Q. Well,——

A. So it is out of pocket money.

Q. Well, was it paid out at that time?

A. Sir? [180]

Q. Was it paid out?

A. Yes, sir, it was paid out.

Q. Have you got any records to show it was paid out?

A. I do not have the records now.

Q. It's simply a bookkeeping entry, is it not, 15 per cent?

(Testimony of Charles B. O'Brien.)

A. That is what it amounted to for those phases.

Q. That's what—that's fine, thank you. Now, you have an item in this \$6,954.23, Equipment 09. What does that refer to?

A. That refers to the amount of cable that was replaced.

Q. And where are the records which support that item?

A. The records to support that item are in my work papers.

Q. Have you got those with you? A. Yes.

Q. Well, may I see them? A. Yes, sir.

(Papers were handed to Mr. Morrow.)

Q. All right. Now, Sergeant, will you please state what the total out of pocket expense and costs were excluding the item of depreciation and the item of overhead?

A. The direct out of pocket cost to the Alaska Communication System was the amount of \$6,540.23, which would mean the deduction of the depreciation.

Q. I frankly don't know whether you have answered the question or not and I would like to have the question reread. [181]

A. I have answered the question of out of pocket money to the Alaska Communication System.

Q. Now just a moment. The question just calls for a dollar figure. Now I'm going to ask that the question be reread and that you listen to it and that you give us the exact answer to the question.

Mr. Morrow: May I have it reread, your Honor?

(Testimony of Charles B. O'Brien.)

The Court: That will be done. It will be reread.

(The reporter read the question as follows:

“Q. Now, Sergeant, will you please state what the total out of pocket expense and costs were excluding the item of depreciation and the item of overhead?”)

(Papers were handed to the witness.)

A. Excluding those two items, depreciation and the 15 per cent overhead, the figure is \$6,262.03.

The Court: 62 what?

A. \$6,262.03.

The Court: Excluding what items?

A. Excluding depreciation of \$504 and a 15 per cent overhead of \$188.20. [182]

The Court: One hundred and what?

A. \$188.20.

The Court: So with those items excluded you have a reduction on the \$6,954 of \$6,262.03?

A. Yes, sir.

The Court: You may proceed.

Q. (By Mr. Morrow): Now, these out of pocket expenses going to make up the sum of \$6,262.03 include all items of our of pocket expenses, do they?

A. No, sir.

Q. Other—just a minute. Other than depreciation and overhead?

A. They include the direct charges.

Q. Well, I'm going to repeat the question. Does this figure of \$6,262.03 include all out of pocket expenses of the ship Lenoir for the Fort Lawton-Seattle submarine cable repair between March 23

(Testimony of Charles B. O'Brien.)

and March 29, 1955 other than the item of depreciation and the item of 15 per cent overhead?

A. They include the cost of the cable ship Lenoir.

Q. Can you answer the question yes or no?

A. Yes.

Q. Your answer is yes?

A. For the cable ship Lenoir.

Mr. Morrow: That's all. I have no further [183] questions.

Redirect Examination

Q. (By Mr. Broz): Sergeant O'Brien, do they include all of the out of pocket expenses for the cable repair?

A. No, sir, they do not.

Q. What expenses do they not include?

A. They do not include the direct overhead expense for the headquarters of the Alaska Communication System.

The Court: How much is that item, do you know?

A. That item would run roughly around 20 per cent.

The Court: Overhead?

A. Yes, sir.

The Court: How much in dollars?

A. That would run approximately roughly around fifteen to seventeen hundred dollars for the total headquarters of the Alaska Communication System.

(Testimony of Charles B. O'Brien.)

The Court: Is that the amount which equals the percentage you just mentioned?

A. No, sir, it does not. This percentage——

The Court: I will tell you, Mr. O'Brien, if you could just answer questions—it is all right for you to take a little time if it is necessary to realize [184] what a question means, but we are not interested in having you give answers that are not called for, and you have done that an awful lot of times while you have been on the stand today. I am trying to find out what is the fact, how much in dollars does the overhead item not included in \$6,262.03 amount to. Otherwise saying, what is the amount in dollars of the overheads which you have not included in the \$6,262.03 under the cross examination of respondent's Counsel?

A. It would be an estimate at this time. It would be an estimate of \$1,200.

The Court: You may inquire.

Mr. Broz: Thank you, your Honor.

Q. (By Mr. Broz): Sergeant, you don't have any records with you to substantiate those figures?

A. No, sir, I do not.

Q. Does the figure of \$6,262.03 include any costs relating to the preparation of the cable ship for putting to sea and repairing the cable?

A. It does not.

The Court: What did you call that item, repairs?

Mr. Broz: For preparing the ship for sea and to make the repair.

(Testimony of Charles B. O'Brien.)

The Court: Somehow or another I do not [185] appreciate what is meant by the inquiry and what items or operations are included in the question.

Q. (By Mr. Broz): Sergeant, what operational costs, out of pocket expenses, of the Alaska Communication System were not included in the figure of \$6,262.03 which relate to the cable repair job on the Seattle-Fort Lawton cable?

A. It does not include the preparation of the ship to go on this repair job, this cable break repair job.

Q. You do not have the figures that would represent that cost with you, do you?

A. No, sir, I do not.

The Court: As I recall, this witness at some time since he has been on the stand made some reference tentatively or otherwise when libelant's Counsel was interrogating him about a \$1,500 item. \$1,500 per day, it seems to me, if I recall correctly. If that is still in the case I would like to have that explained, unless it has been withdrawn.

Mr. Broz: It has not, your Honor.

Q. (By Mr. Broz): Sergeant, with reference to the \$1,500 item which you have previously testified to, will you state what that figure of \$1,500 represents?

A. It represents what the ship would be chartered for to a government or commercial concern on a daily basis, the [186] price the concern would have to pay.

The Court: The charter hire value, is that it?

(Testimony of Charles B. O'Brien.)

A. Yes, sir, the charter hire.

Mr. Morrow: If it please the Court, this witness has not qualified himself to say what some private person would pay for the charter of the vessel. His previous testimony and his capacity only deals with an accounting analysis of an average daily cost. The Court previously had indicated that this witness wasn't and hadn't qualified to testify in respect to what a reasonable charter hire might be for this vessel, and I move that the witness'—

The Court: The Court will grant that motion and does strike it. The Court did not realize that was what it was about.

Q. (By Mr. Broz): Sergeant, you testified earlier concerning a \$1,500 cost item. What did the \$1,500 cost item which you testified to relate to?

A. It related to the amount that the ship would be chartered to a commercial or other government agency on a daily cost basis.

Q. Did that figure represent—

Mr. Morrow: The same objection, your Honor.

The Court: If it relates to what in the commercial charter market this vessel could be had for [187] or rented for or rented out for, the objection is sustained.

Q. (By Mr. Broz): You made a reference, Sergeant, to a daily cost figure? A. Yes, sir.

Q. Does that relate to the \$1,500 item in any way?

A. I don't understand your question.

(Testimony of Charles B. O'Brien.)

Q. On the basis of your cost accounting experience with reference to this particular ship——

The Court: Experience, do you mean work?

Mr. Broz: If it please the Court, I do.

Q. (By Mr. Broz): With reference to your cost analysis of the Lenoir which you earlier testified to that you conducted in 1954 and subsequently reviewed through until the present time, did you arrive at an operational cost figure for the Lenoir?

A. Yes.

Q. Was that a daily operational cost figure?

A. Yes, it was.

Q. And did that represent the cost of operating the ship to the Alaska Communication System?

A. It represented a cost of operation to the Alaska Communication System.

Q. And what was that daily cost figure?

A. \$1,500. [188]

Mr. Broz: No further questions.

Recross Examination

Q. (By Mr. Morrow): Sergeant O'Brien,——

The Court: That daily cost figure is for what sort of activity on the part of the vessel?

A. That is the laying or repairing of submarine cable, which is the work the ship does.

The Court: Would that not include for instance that item you mentioned a few minutes ago of readying, or repairing I think you said but you probably meant to include the sense of readying,

(Testimony of Charles B. O'Brien.)

the vessel for a specific repair job in case it should be and when called upon to make the repair?

A. The \$1,500 does include that preparation for going to the repair job, your Honor.

The Court: Is not a cable ship supposed to hold itself in readiness daily to proceed upon a repair job if one comes along? Is that not a part of its business, or did your studies include that subject?

A. My studies included the overall operation of the cable ship as to a standby, which at that time her crew was reduced to the crew that would be going out on a repair. The cable ship does not have at all [189] times the sailing complement when it is tied up at the dock.

The Court: You may inquire. Do not let the inquiry lag. Is there anything else?

Mr. Morrow: Yes, your Honor. I would like to have the log book of the cable ship Lenoir marked. It is agreed that it may be admitted in evidence. That is for the period of March, 1955.

The Clerk: It will be marked Respondent's Exhibit A-3.

(Log book of Basil O Lenoir was marked Respondent's Exhibit No. A-3 for identification.)

Q. (By Mr. Morrow): Sergeant O'Brien, I hand you Respondent's Exhibit A-3, which—

Mr. Morrow: I offer this in evidence. It is agreed under the pretrial order.

The Court: Could you give it a name, please?

Mr. Morrow: The log book of the Lenoir.

The Court: Any objection to the offer?

(Testimony of Charles B. O'Brien.)

Mr. Broz: No objection, your Honor.

The Court: Admitted.

(Respondent's Exhibit No. A-3 for identification was admitted in evidence.)

Q. (By Mr. Morrow): Now, does Respondent's Exhibit A-3 [190] show the time when the Lenoir started to make preparations for the Fort Lawton-Seattle repair? I direct your attention to March 23, 1955.

A. At 10:30 o'clock on Wednesday, 23 March 1955, "Splice 102-B-'A' Type to 102-B-'LA' Type."

Q. Well, your answer is yes, it does?

A. That's correct, sir.

Q. And that started on March 23, 1955, didn't it?

A. Yes, sir.

Q. Now, when you prepared your ledger sheet or looked into information to determine the costs of the repair, you looked at the log, did you not?

A. No, sir.

Q. Well, now I direct your attention to some testimony which you gave a few minutes ago to the effect that the cost items did not include the period for preparation to go out and make the repairs. Do you recall that testimony?

A. Yes, sir.

Q. Well, now, it shows, does it not, in the log book that the ship started to make preparations for repairs on March 23, 1955?

A. On the cable, sir, not preparation to go. On the cable only, not preparation to go.

Q. All right. Now, if you will look in the log

(Testimony of Charles B. O'Brien.)

book you [191] will find that the preparations to go were made a little later, weren't they?

A. Previous.

Q. Well, where do you find that in the log book? I don't think you'll find it.

A. I don't find it here.

Q. You don't find it. As a matter of fact, Sergeant O'Brien, the Lenoir at the time on March 21, 1955 was making preparations and outfitting to do a cable job up in Alaska, wasn't it?

A. I couldn't tell from this log. It doesn't indicate it here, sir.

Q. Well, don't you recall that to be a fact when you made your investigation as to costs of this job?

A. Bearing on my recollection at that time, she was getting ready to go to Alaska.

Q. Yes. Now your recollection is refreshed, can you now state that your costs in respect to the repair of the Fort Lawton cable in March, 1955 are dealt within your testimony of the costs for the period from March 23 to March 29, 1955?

A. That was the period that the ship was at the job, at the site.

Q. That's right. Well, now, you don't purport to give any evidence in respect to the damages sustained by the [192] libelant for any period prior to March 23, 1955, do you? A. Yes, sir.

Q. Well, now, what is your testimony in that respect?

A. We did not charge any of the cable ship's

(Testimony of Charles B. O'Brien.)

time in preparation to go to this specific cable break between Fort Lawton and Seattle.

Q. Well, do you have any figures——

A. May I finish, sir?

Q. Do you have any figures which support that?

A. I do not have those figures with me, no, sir.

Q. Well,——

The Court: Wait just a moment.

Mr. Morrow: Yes.

The Court: Now what did you want to say to finish your statement? You wanted to finish your statement.

A. In the cost of a repair of a submarine cable throughout the accounting profession from the time that that specific cable is reported out of service is the time that the charges are rightfully charged to that job.

Q. (By Mr. Morrow): Well, I understand that——

A. They had notified the submarine cable ship.

Q. Yes. I understand that may be an accounting procedure, but as a matter of fact the only charges which you charged this job are those which you have testified to, aren't they? [193]

A. Yes, sir.

Mr. Morrow: That's all.

Mr. Broz: No further inquiry.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Mikkeltorg: The libelant will call Mr. Getzendaner.

MARK A. GETZENDANER

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mikkeltorg): Will you please state your name, sir, and spell it for the clerk?

A. Mark A. Getzendaner, G-e-t-z-e-n-d-a-n-e-r.

The Court: Getzendaner?

A. Getzendaner.

The Court: And it is Mark A.?

A. Mark A.

The Court: Pardon? Just repeat yes or no.

A. Yes.

The Court: It is Mark A? [194]

A. Yes, sir.

Q. (By Mr. Mikkeltorg): Will you state your address, please, sir?

A. 17430 Ballinger Way.

Q. What is your present position Mr. Getzendaner?

A. I'm the General Counsel for the Alaska Communication System.

Q. And how long have you occupied that position?

A. Since the 2nd of February, 1954.

Q. Are you a member of any bar, Mr. Getzendaner?

A. Yes, I am.

Q. Of what bars or court?

(Testimony of Mark A. Getzendaner.)

A. The State of Ohio and of this court.

Q. Are you a member of the federal bar of this court?

Mr. Morrow: We admit Mr. Getzendaner's qualifications as an attorney.

Q. (By Mr. Mikkelborg): In general, Mr. Getzendaner, what are your duties as Counsel for the Alaska Communication System?

A. I supervise the operation of the law division of the headquarters and advise the commanding officer and his staff on legal problems.

Q. With regard to your duties concerning legal problems, do they include matters of preparation of contracts or negotiation of contracts for the acquisition of telephone [195] or telegraph facilities for Alaska Communication Service?

A. Yes, they do.

Q. Do they also include negotiation and preparation of contracts with regard to facilities operated by the Alaska Communication Service and made available to other agencies or persons?

A. Yes.

Q. Have you had any occasion to prepare a contract or agreement with regard to the cable ship *Lenoir*? A. I have.

Q. Have you prepared similar contracts or agreements with respect to any other cable ships?

A. Yes, I have.

Q. With respect to the agreement concerning the *Lenoir*, what arrangements were made and with what party or what concern?

(Testimony of Mark A. Getzendaner.)

Mr. Morrow: I object to the question unless it is limited in time and unless it is connected up materially to this case.

Mr. Mikkeltorg: If the Court please, we will relate the matter of time in relation to this case in about two more questions.

Mr. Morrow: I don't know why that couldn't be done first.

The Court: Yes, I have the same feeling. Can you not find out if anything was done regarding this [196] matter by him? "What did you do concerning this matter," and so forth. Identify it. "What kind of subject matter did your work encompass," or something of that sort, and then after you find out whether or not it is anything that concerns this contract you could bring the contract forward and have it marked at least for identification. It may never be admitted, but you could have it marked. Proceed.

Q. (By Mr. Mikkeltorg): Directing your attention, Mr. Getzendaner, to the period of April, 1956, was there any arrangement concerning the Lenoir prepared by you or consummated by you at that time?

A. In the general period of time, within several months of that time, yes.

Q. And what was that?

A. We chartered the Lenoir to the American Telephone & Telegraph Company.

Mr. Morrow: I object to further questions along this line. Certainly the chartering of the Lenoir

(Testimony of Mark A. Getzendaner.)

to the A. T. & T. in April, 1956 in no way can establish any reasonable charter hire of the Lenoir. The specific instance of one year later certainly is immaterial and irrelevant.

The Court: The objection is sustained until we find out what the charter hire rate was at about [197] the time this accident occurred. It can be done by proper witnesses orally the same as by some writing. Please proceed. I think the Court is sufficiently reminded by those connected with this case as to what is important and what is not. I think we are about to get into the position of dilly-dallying around about bringing forward proof. Proceed. Let us expedite this trial. I know that is not intended, but we are about to be getting into that sort of position in the case. The trial is not progressing like it should and a trial normally does. Proceed.

Q. (By Mr. Mikkelborg): In connection with your duties, Mr. Getzendaner, as Counsel for the Alaska Communication System, did you cause any figures to be prepared with respect to the cost to the government of the Lenoir during the year 1955? A. Yes, I did.

Q. And will you state what periods of 1955 you caused such figures to be prepared?

A. I caused a figure to be prepared based upon the operating year, January, 1955 through December of 1955.

Q. Was that in connection with an agreement

(Testimony of Mark A. Getzendaner.)

for the use of the Lenoir on a cost basis to some other operating organization than ACS?

A. Yes, sir, it was. [198]

Q. What organization was that?

A. The American Telephone & Telegraph Company.

Q. What figure was derived with respect to the cost of the Lenoir in connection with such an agreement?

A. \$1,500 per day.

Q. What does that figure represent?

A. That figure represents the actual cost to the government of operating the Lenoir per day.

Q. Was that the same figure that was in effect in March of 1955?

A. Yes, it was.

Q. Does that figure include any profit?

A. It includes no profit.

Q. Does it include any loss to ACS?

A. To my knowledge it includes no loss.

Q. What were your instructions, or what was your objective in connection with arriving at a figure for the use of this vessel at that time?

A. My instructions were to determine the actual cost of operation of the vessel to the government without a figure for profit and reflecting no loss.

Q. What steps did you take, Mr. Getzendaner, in early 1955 or at any time in 1955 with respect to obtaining that figure?

A. I called upon our comptroller who is in charge of the [199] fiscal division of our operations to provide me with such a per diem figure.

(Testimony of Mark A. Getzendaner.)

Q. Did anyone from the comptroller's office work with you in that connection?

A. I had some contact with the comptroller himself and I think an occasional contact with Sergeant O'Brien. However, he developed the figures I think based upon his records and in connection with other records in the comptroller division.

Q. Was some sort of contractual arrangement executed with anyone on the basis of that figure?

A. Yes, there was.

Q. What was that contractual arrangement? Would you describe it, please?

Mr. Morrow: I object to any contractual arrangement in 1956 as being irrelevant and immaterial on the question of damages.

Mr. Mikkelsen: In that connection, if the Court please, the witness has stated that the essence of it, of course, being the price or the cost was derived at the particular time material in this case, namely, in 1955, including the month of March, 1955.

The Court: The objection is overruled.

The Witness: May I have the question read back? [200]

The Court: Read it, Mr. Reporter.

(The reporter read the last question as follows:

"Q. What was that contractual arrangement? Would you describe it, please?")

A. The United States Government entered into

(Testimony of Mark A. Getzendaner.)

a charter party with American Telephone & Telegraph Company for the services——

Mr. Morrow: I——

The Court: No, do not read any document that is not in evidence.

Mr. Morrow: If there is a document, it seems to me that there would be an objection to it as not being the best evidence, and I object on that ground besides irrelevancy and immateriality.

The Court: That objection is sustained. If you have something, mark it and we will see.

Q. (By Mr. Mikkelborg): Would you lay aside that document, Mr. Getzendaner, and just state in general terms the arrangement?

Mr. Morrow: Well, I object to that. That doesn't satisfy the objection if there is a document.

The Court: The objection is sustained.

Mr. Mikkelborg: Very well. [201]

Q. (By Mr. Mikkelborg): Did you bring with you the charter party which you have referred to?

A. Yes, I did.

Q. Do you have it with you now?

A. Yes.

Mr. Mikkelborg: May we have it marked?

The Court: It will now be marked libelant's exhibit next in order.

The Clerk: Libelant's Exhibit 4.

(Copy of charter party agreement was marked Libelant's Exhibit No. 4 for identification.)

The Court: I wish you, if you have any more

(Testimony of Mark A. Getzendaner.)

exhibits, to bring them all out now and exhibit them to opposing Counsel and tell him what you intend to do with them now, and I wish you to mark them all and introduce them all at one time. We have spent enough time on exhibits in this trial. This is the second day of this trial and we do not have the libelant's side of the case finished yet. Let that be marked.

The Clerk: Libelant's Exhibit 5.

(Copy of War Department permit was marked Libelant's Exhibit 5 for identification.)

The Court: Do you wish at any time during the trial to have this received in evidence?

Mr. Broz: It is an agreed exhibit, your Honor.

The Court: The last one, Exhibit 5.

Mr. Mikkeltorg: Is the Court referring to an exhibit marked "Permit"?

The Court: Yes, it is.

Mr. Mikkeltorg: That I believe is an agreed exhibit.

The Court: Is there any objection to its going into evidence?

Mr. Morrow: No.

The Court: It is now admitted.

(Libelant's Exhibit No. 5 for identification was admitted in evidence.)

The Court: Now Libelant's Exhibit 4, what kind of a thing is that?

Mr. Mikkeltorg: A charter party agreement.

The Court: It is the subject about which you

(Testimony of Mark A. Getzendaner.)

are inquiring of this witness now on the stand, is that correct?

Mr. Mikkeltborg: That's correct.

The Court: You may proceed to inquire of the witness.

Mr. Mikkeltborg: I ask that the witness be furnished Libellant's Exhibit 4.

(Mr. Morrow examining Libellant's Exhibit No. 4 for identification.) [203]

The Court: Proceed.

Mr. Morrow: This is my first opportunity to look at this, your Honor.

The Court: It is marked here. Was it not submitted to you before?

Mr. Morrow: No, your Honor.

The Court: I have a good notion to exclude further use and reference to it. The purpose of the pretrial procedure was to disclose to opposing Counsel all intended exhibits, and if that was not done I am considering forbidding any further use of the document.

Mr. Mikkeltborg: If the Court please, this document and the testimony in connection with it was the subject matter of the materials uncovered the evening before the trial began and was also the subject of the motion we made asking the Court to permit us to amend.

The Court: Why did you not then and there submit this to opposing Counsel and let him see it and tell him what you intended to do with it?

(Testimony of Mark A. Getzendaner.)

Why do you wait now to take up your time needlessly and the Court's?

Mr. Mikkelborg: The existence of this duplicate document in the hands of this witness was only discovered this morning.

The Court: Why did you not show it to him when you discovered it the first thing this [204] morning so he could have seen it during the noon hour?

Mr. Mikkelborg: We were occupied with another portion of the trial, your Honor, and had other problems.

The Court: The objections are sustained. Proceed with the case.

Mr. Mikkelborg: May I——

The Court: The Court declines to permit any further use of this document.

Q. (By Mr. Mikkelborg): Mr. Getzendaner, do you have personal knowledge in connection with the charter party agreement between ACS and the American Telephone & Telegraph Company?

A. I do.

Mr. Morrow: May it please the Court——

Q. (By Mr. Mikkelborg): Did you prepare that——

The Court: Wait just a moment.

Mr. Morrow: I wish to make a motion, if I may. I would like to move the exclusion of any further testimony in connection with charter hire or reasonable charter hire or average costs of the vessel Lenoir on the ground that it is not alleged

(Testimony of Mark A. Getzendaner.)

or stated in the original pleadings or in the pre-trial order that any such claim is made on that basis. The claim in Paragraph II on Page 3 of the libelant's contentions make [205] the following claim for damage only: "That in consequence of said damage and break"—that is Page 3, Line 4—"the necessary repairs have been accomplished at the reasonable sum of approximately \$9,000." There are no special damages claimed in connection with the loss or any expense other than expense items pertaining to the repairs.

The Court: I have seen before this occasion in this file the pretrial order and I find it has not been put in the file yet and I ask the clerk as soon as we finish referring to this on this occasion to affix this in the file so it will not be lost, and every other paper in this case, including the briefs, put them in the file, attach them in the file.

What page do you refer to?

Mr. Morrow: Page 3.

The Court: I have it.

Mr. Morrow: Line 4.

The Court: I have that, too. "In consequence of said damage and break in the Alaska Communication System submarine cable the necessary repairs have been accomplished at the reasonable sum of approximately \$9,000, in which sum libelant herein has been damaged." What is it now that you say?

Mr. Morrow: The objection is to testimony on [206] an item of damages for reasonable charter

(Testimony of Mark A. Getzendaner.)

hire of the vessel Lenoir on the basis that the claim in the pretrial order is for necessary repairs in the the sum of \$9,000.

The Court: Any response?

Mr. Mikkelborg: If the Court please, the libelant in this case I submit should not be penalized on something that is a matter of form. I ask the Court to direct its attention to Page 4 of the agreed pretrial order, the issue of fact——

The Court: What line, please?

Mr. Mikkelborg: On Lines 1 and 2.

The Court: Item No. 4?

Mr. Mikkelborg: Item No. 4, "The damages, if any, that the libelant sustained as the result of negligence or fault, if any, of the respondent," and the issues of law in there, namely, what damages, if any, the libelant sustained as the proximate result of the negligence or fault of the respondent.

In this case we're attempting to show, and the language in the pretrial order——

The Court: Does the \$9,000 include this item that is now objected to?

Mr. Mikkelborg: It certainly does, your Honor.

The Court: It does include that?

Mr. Mikkelborg: It does include that. [207]

The Court: What have you to say as to that?

Mr. Morrow: Well, my——

The Court: It is not an item in addition to \$9,000, is it?

Mr. Mikkelborg: Certainly not, your Honor.

Mr. Morrow: Well, my objection is that the

(Testimony of Mark A. Getzendaner.)

complaint or what are now the contentions limits the scope of provability of damages. The claim is for damages for repairs. Now we are getting 'way outside that and claiming charter hire here or reasonable charter hire.

The Court: What has this to do with repairs, or what do you seek to show this item you are trying to prove for this hire has to do with cost of repairs?

Mr. Mikkeltborg: We seek to show, if the Court please, that the item before the Court, the charter party, is a figure based on the out of pocket cost to the government of the operation of the *Lenoir* on a per diem basis, a figure that was arrived at before and including the time of this submarine cable damage; that that figure represents the per diem cost and that figure represents the cost of the use and employment of the *Lenoir* during the time she was required to repair the Seattle-Fort Lawton submarine cable and as such constitutes the cost of the repair and the damages to the [208] libellant in the case.

Mr. Morrow: I believe what Counsel said is that they are now claiming an item of detention for the ship *Lenoir*. That is not an item which is claimed in the complaint, in the original libel, or in the contentions. They are only claiming for repairs.

The Court: The objection is overruled.

Mr. Mikkeltborg: May we proceed, if the Court please?

(Testimony of Mark A. Getzendaner.)

The Court: You may now proceed within the limits now confronting the situation.

Mr. Mikkeltorg: May we have the privilege of introducing or working with the charter document itself?

The Court: No, you have not. You have not the privilege of referring to it or using it any further in the case. Proceed.

Q. (By Mr. Mikkeltorg): Do you have personal knowledge of the arrangement between Alaska Communication System and American Telephone & Telegraph Company based on the figures derived in 1955 including the month of March, 1955?

A. I do.

Q. Did you—

Mr. Morrow: I object, your Honor. I believe Counsel is circumventing the Court's ruling. [209]

The Court: This does not circumvent it and the objection is overruled. He can state what is in his personal knowledge with respect to the fact of the existence of an arrangement and, if he knows what the cost of the arrangement was in connection with the repairs, he may state so upon a proper question being addressed to him along that line, but he cannot introduce the contents of any written agreement, and if he has one before him I wish him to surrender it.

Q. (By Mr. Mikkeltorg): Do you have anything before you, Mr. Getzendaner?

A. No, I don't.

Q. Did you prepare the agreement we have re-

(Testimony of Mark A. Getzendaner.)

ferred to personally yourself? A. Yes.

Q. What was the per diem figure——

The Court: You can ask him what any rental or letting of the use of the vessel to anybody was, but you cannot ask him anything about a contract. You can ask him the result of the operations or the conduct of the parties, what he knows of that.

Q. (By Mr. Mikkeltborg): What was the result of your negotiations or transactions in that respect?

A. The cable ship was leased to the American Telephone & Telegraph Company. [210]

Q. And what arrangements were made with respect to the consideration or cost?

The Court: Not the arrangements, but what it cost.

Mr. Mikkeltborg: Very well.

Q. (By Mr. Mikkeltborg): What did it cost American Telephone & Telegraph?

The Court: If he knows.

Q. (By Mr. Mikkeltborg): If you know, Mr. Getzendaner.

A. \$1,500 per day.

Q. And would you state whether that figure includes any profit to ACS or any loss to ACS?

A. To the best of my knowledge it includes no profit nor loss.

Q. Would you state whether or not that was the objective in determining the charter hire figure?

A. That was the objective, yes, sir.

Q. When was that figure arrived at?

(Testimony of Mark A. Getzendaner.)

A. It was arrived at in January and February of 1956.

Q. What was that figure based on?

A. It was based on the experience and records of the ACS for the year 1955.

Q. Was that based on monthly cost figures or quarterly cost figures, or what periods were used?

A. I do not know what the basis of it was. [211]

Q. Do you know who prepared the cost analysis?

A. No, I don't. I know that Sergeant O'Brien had something to do with it, but actually prepared it I do not know.

The Court: Since this was received over objection I wish to be informed by Counsel offering this testimony as to whether or not there is any dispute in this case as to the right of the United States to sue for this. I understand that this last item was something that was a cost to the American Telephone & Telegraph Company and not the United States of America. The United States of America is the libelant in this case, not the American Telephone & Telegraph Company.

Mr. Mikkelborg: Yes, your Honor, the figure——

The Court: This exhibit is received over objection, and that objection has not been dealt with. What right have you to introduce evidence of repair expense sustained by a person who is not suing here for relief of the Court?

Mr. Mikkelborg: We are not, if the Court please, introducing any item of repair expense with respect to A. T. & T. The testimony here has sought

(Testimony of Mark A. Getzendaner.)

to elicit, and I believe has elicited, the cost of the operation of the Lenoir to the libelant during the time of this cable break and during the time of the repair of the cable break, that this cost figure was derived [212] during this time and it was a no profit and loss figure, and that the same figure was used in a subsequent charter arrangement as depicting the cost of operation of the Lenoir on a per diem basis to the libelant.

We have no further questions of this witness.

The Court: Is there any objection on this ground involved in the Court's question of Counsel just now stated? I ask that question of Counsel for the respondent.

Mr. Morrow: Yes, there is, your Honor. I can't see any relevancy in chartering the vessel to American Telephone & Telegraph in 1956 and the amount of charter hire in any way tied up or connected with repairs to this cable in March of 1955.

The Court: Do you offer this evidence of what was paid to the United States, the libelant here, for the use of its cable ship Lenoir by the American Telephone & Telegraph at one time as evidence of what it would have necessarily cost the United States to employ that cable ship in this repair job? Is that the reason for it, or what is the reason for it?

Mr. Mikkelsen: No, your Honor. This testimony is corroborative of the testimony of Sergeant O'Brien wherein he testified he derived the cost of the operation of the Lenoir on a per diem basis

(Testimony of Mark A. Getzendaner.)

covering the [213] period of time here in question.

This witness has testified that the cost figures were used in an agreement whereby the Lenoir was made available to another agency on a cost basis, the very self-same figure. It simply shows the cost to the government of maintaining and operating the Lenoir during the time in question. That figure was derived, and having been derived was subsequently made available to A. T. & T. and the vessel was——

The Court: Did the government ever repair this cable?

Mr. Mikkelborg: Yes indeed, your Honor.

The Court: Why could it not show what the cost of the repairs was?

Mr. Mikkelborg: We attempted to show that, if the Court please, by the routine ledger sheet entries prepared by the libelant's cost accountant.

The Court: What was done as to another job may be wholly different. The other job may have been one that was done in some other waters other than Pacific waters or other than Puget Sound waters or other than State of Washington waters or other than Alaskan waters. It may have been under conditions so dissimilar to this that there is no comparison. I cannot tell, and I do not know in the operation but that the vessel in [214] connection with the job may have necessarily encountered collateral conditions not common to the conditions here, Mr. Mikkelborg.

Mr. Mikkelborg: If the Court please, the costs

(Testimony of Mark A. Getzendaner.)

of operating the vessel would be the same within the immediate area of the Northwest, and if the Court is concerned as to that matter, the next witness will testify as to where the Lenoir was employed during this particular charter, if that is of importance.

The Court: This objection is sustained and the Court's admitting this evidence is set aside and the evidence is stricken and the Court will disregard it and declines to hear any further evidence on this collateral transaction. You may proceed.

Mr. Mikkelborg: If the Court please, in that event we will reoffer Libelant's 3, which was the cost accountant's ledger sheet of the repair costs accrued against the cable repair job in his cost records.

The Court: Any objection?

Mr. Morrow: I——

The Court: It is Mr. O'Brien's cost sheet. Let Mr. Morrow see it.

(The exhibit was handed to Mr. Morrow.)

Mr. Morrow: The same objection I made before, your Honor, that this ledger is not supported by [215] any original documents.

The Court: The Court sustains the objection and declines to receive that document in evidence, not only for that reason but for other reasons previously discussed.

(Libelant's Exhibit No. 3 was rejected.)

The Court: Any other questions you wish to ask of this witness?

(Testimony of Mark A. Getzendaner.)

Mr. Mikkeltorg: No further questions of this witness.

The Court: You may cross examine.

Mr. Morrow: No questions.

The Court: Step down, please.

(Witness excused.)

The Court: Call the next libelant's witness.

Mr. Mikkeltorg: The libelant will call Mr. Christensen.

The Court: Come forward and be sworn. [216]

STANLEY H. CHRISTENSEN,
called as a witness in behalf of libelant, being first
duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mikkeltorg): Will you please state your name, sir?

A. Stanley H. Christensen.

Q. And your address?

A. 3411 California Avenue.

Q. Your position?

A. Cable foreman aboard the cable ship Lenoir.

Q. How long have you held that position?

A. Since August, 1946 to the present date.

The Court: How do you spell Christensen?

A. C-h-r-i-s-t-e-n-s-e-n.

The Court: You may proceed.

Mr. Morrow: I'm sorry, I didn't get it. Is it——

The Court: It is C-h-r-i-s-t-e-n-s-e-n.

(Testimony of Stanley H. Christensen.)

Mr. Morrow: Thank you.

Q. (By Mr. Mikkelborg): Did you hold that position in March of 1955? A. I did.

Q. What are the duties of your position?

A. Supervise the splicing and testing of the submarine cable. [217]

The Court: You will have to speak up more distinctly than that, and I think probably it would be helpful if you would lean back against the back of the chair and just let it support your back because with most witnesses, it has been the experience in the past, it does not help any to lean forward and therefore affording a shortening of the distance between you and the person wanting to hear. What is your official capacity or relationship with this matter?

A. Cable foreman on board the cable ship Lenoir.

The Court: You may proceed.

Q. (By Mr. Mikkelborg): What was your assignment in—do you recall any specific assignment in March of 1955?

A. In regard to the job?

Q. With regard to any work you did at that time.

A. I don't understand your question.

Q. Do you recall any specific jobs that you worked on or participated in in March of 1955?

A. Yes, the repair of the Seattle-Fort Lawton submarine cable.

Q. Did you personally participate in that re-

(Testimony of Stanley H. Christensen.)

pair job of the Seattle-Fort Lawton submarine cable? A. Yes.

Q. Would you describe what you did in connection with that [218] work?

A. I supervised the splicing and testing of the submarine cable that was broken.

Q. Were you aboard the Basil O. Lenoir?

A. I was.

Q. Where was your station? Where did you perform your work on the ship?

A. Well, my work was performed at different places, but while we were starting the repair I was on the bow of the ship. We took the end off the sea wall inside of Pier 57 and commenced picking it up towards the break. I was at the bow of the ship watching the cable as it came over the bow.

Q. Did you observe the cable being picked up from the sea wall? A. I did.

Q. Did you observe it during the entire run or picking up process from the sea wall until the end was found? A. Yes.

Q. Would you describe what you observed with respect to that cable?

A. Well, first of all, where the cable came out of the sea wall it was pulled real tight from the hole down to the water, it had a scope, and from the sea wall back to the manhole where the terminal is the cable was [219] stopped there with a chain and that was pulled bar tight so that we couldn't remove it, and so consequently the cable was cut

(Testimony of Stanley H. Christensen.)

out by the sea wall and the end was pulled aboard and then we commenced picking up out towards the break, and as I watched that cable coming aboard——

Q. Just a minute, Mr. Christensen. With respect to your testimony of the tightness of the cable at the sea wall, was that the usual condition of the cable? Was that the way it was laid?

A. No, sir. It hung straight up from the bottom up to the hole where it goes into the sea wall. In other words, it hung straight up and down. That's the normal condition.

Q. All right. Would you describe your observation, what you observed with respect to the cable as it came aboard?

A. Well, we picked the cable up from the sea wall out towards the break. My observation, and I'm trying to remember, is that we picked up approximately 1,500 feet. The cable was in fairly good condition, but from then on out I observed that something had been dragging along the cable and had scuffed the outer jute, and then as we came out more towards the end approximately, well, 500 feet from the end, it was very badly scuffed. That is, all the jute had been torn off the cable and it [220] appeared that some steel object had been rubbing very hard, drug along the cable, because it scarred the steel, the steel armor, and smashed——

Q. How much length was involved in this scarring?

(Testimony of Stanley H. Christensen.)

A. Oh, I would say approximately — well, the jute was torn off 500 feet, and from about 200 feet it was scarred off toward the end.

Q. How much length was involved with the scoring or chafing on the jute without actually tearing the jute away? How much length of the cable was so marked?

A. Well, to my recollection I would say a thousand feet.

Q. Did you observe the condition of the end of the cable? A. Yes.

Q. Was it a broken end?

A. It was a broken end. It was exposed. The copper conductors were exposed to the sea water and there was a solid ground, the copper conductors to the sheath.

Q. Would you describe the appearance of the end with respect to whether it was barnacle encrusted or old or new or fresh or what?

A. It was very shiny, just like some steel object or some heavy object had rubbed against it.

The Court: What was the condition of it at the place of the maximum damage effects? What happened to the cable there at that place where the climax [221] result occurred?

A. Well, it pulled apart, it was broken in two.

The Court: What was broken in two?

A. The submarine cable.

The Court: You may inquire. Proceed.

Mr. Mikkelsen: Counsel may cross examine.

(Testimony of Stanley H. Christensen.)

Cross Examination

Q. (By Mr. Morrow): I assume you have been employed aboard the cable ship Basil O. Lenoir for a good number of years, Mr. Christensen?

A. Yes.

Q. Do you hold any licenses from the United States? A. No, I do not.

Q. What previous experience in repairing or laying cables have you had?

A. Previous to 1955?

Q. Yes.

A. Well, I've been employed by the Alaska Communication System aboard the cable ship Lenoir since August of 1946 as a civilian.

Q. I see. Now, you testified that you started picking up the cable at the sea wall. You pick that up on a drum, [222] do you not? A. Yes.

Q. And the drum has a counter on it so you can tell how many fathoms of cable you have picked up? A. Yes, sir.

Q. In this instance you picked up something like 3,450 feet of cable before you came to the end of the break, didn't you?

A. I presume that's what they picked up, from the records, from the log records.

Q. Yes. Now, you say that the cable was scarred 200 feet from the end?

A. Well, from a hundred to 200 feet, yes, like some metallic object had rubbed against it.

(Testimony of Stanley H. Christensen.)

Q. I see. Is that cable still in existence so it could be examined?

A. The cable still in——

Q. Yes. A. The old cable?

Q. Yes.

A. No, I don't believe it is.

Q. Did you establish the point where the foreign object came first into contact with the cable?

A. Well, some foreign object had drag along it from the fifteen—— [223]

Q. Yes, but did you establish that point in number of feet?

A. By observation I did, yes.

Q. Well,——

A. By the distance out from the dock and all.

Q. Captain Bowen in previous testimony on discovery deposition has indicated that the scuffing started to occur about 500 feet from the end of the cable. Would that be your estimate?

A. Well, I think he probably was referring to a different scuffing. The scuffing that I say started at 1,500 feet was something that was riding along the cable that was just making a mark against the jute. It wasn't tearing the jute or anything.

Q. I see. Well, now, you also mentioned another figure of a thousand feet. What had you reference to there?

A. From 1,500 feet to 1,000 feet out, that is 1,500 feet out from the sea wall and then from that point 1,000 feet out, something had been dragging along the cable.

(Testimony of Stanley H. Christensen.)

Q. Oh, I see.

The Court: You do not speak very explicitly and I am going to ask you, do you mean that beginning at a point about 1,500 feet out on this cable as it was laid out there in its normal condition and extending inward towards the dock, the pier, the landfall, the shore landfall of this cable for about another 500 feet [224] to a point about 1,000 feet from the dock this scuffing or scarring or scraping condition continued, is that what you meant to have said by the words you have already used?

A. Can I repeat my description?

The Court: Yes, but can you not answer my question yes or no, or do you understand my question?

A. I didn't understand your question.

The Court: What I want to know is, what was the longest distance out as indicated by the resulting changes in the exterior appearance of this cable to the nearest point inward to the pier or dock did this scraping condition of this cable appear to you upon your examination of this cable?

A. Well, my observation was that 1,500 feet out from the sea wall I noticed this scraping along the cable. It did not—but this scraping did not tear the jute, it just rolled along the cable.

The Court: We will get the description of the kind of damage later, but we are talking about distance now. Proceed.

A. 1,500 feet out.

(Testimony of Stanley H. Christensen.)

The Court: Beginning there, is that right? Is that the point farthest out from the dock?

A. Yes. [225]

The Court: How far down towards the dock did you follow that scraping effect?

A. This was not down alongside the dock, this was out in the water.

The Court: No, sir, towards the dock farthest away out to seaward from the dock. You have that fixed at 1,500 feet, about. A. Yes.

The Court: You certainly went towards the dock in finding out if there was any damage at any place other than that first spot you struck, did you not?

A. We were not going out—we were going out seaward.

The Court: You were going out from the dock. How far was it from the dock then that you found the first damage?

A. From the sea wall out to where I saw the first indication of something riding on the cable was 1,500 feet.

The Court: Then did you keep on going out to sea? A. Yes.

The Court: Did you see any more damage done?

A. Yes, out towards the end.

The Court: How far from the first place was [226] it damaged, or did you notice any damage?

A. Approximately 500 feet from the end, the outer jute covering on the cable was torn off entirely.

(Testimony of Stanley H. Christensen.)

The Court: I still do not know what he is talking about.

Mr. Mikkelborg: Is that from the broken end, Mr. Christensen?

A. Yes, that's from the broken end in.

Q. (By Mr. Morrow): Well, now, Mr. Christensen,——

The Court: Would that be 22,000 feet or would it be more than 1,500 feet away from the dock or would it be less than 1,500 feet away from the dock measured on the ground or measured on that part of the cable which extended from the dock to the place where you first measured the 1,500 feet?

A. The rotos were started at the sea wall and were picking up out into the water, and as we picked up 1,500 was when I first noticed this scuffing on the outer part of the cable, and that run for approximately a thousand feet until we came to a place where the jute was pulled off entirely, and the steel, which is the armor wires of the cable, was scuffed.

The Court: So the length of the damage to the cable, is this true or not, from the place where you first observed the damage to the farthest out on [227] the cable away from the dock that you noticed damage was about a thousand feet, is that right? The length of the cable damage was about a thousand feet, is that right?

A. No, sir, I'd say 1,500 feet. The thousand

(Testimony of Stanley H. Christensen.)

feet was where the jute torn off and 500 feet where the jute was torn off entirely.

The Court: That does not mean a thing to me. I have less information than I had before the witness took the stand. Proceed with the examination.

Q. (By Mr. Morrow): Let's see if I can straighten this out, Mr. Christensen. Starting from the broken end of the cable——

The Court: Where was that? Name the place where it was.

Mr. Morrow: The cable, your Honor, runs out from the sea wall.

The Court: I understand that, but at what point or how many feet from the point where it touches the grounding of the cable or the fixation of the cable at the dock, how far is it out there?

Mr. Morrow: Yes, I would like to develop that a little later, your Honor. I want to develop something here in a little different manner.

The Court: You may have five minutes. [228]

Mr. Morrow: Yes.

Q. (By Mr. Morrow): The cable was broken out at the Seattle end, and as I understand you started at the sea wall, you proceeded to roll up the cable until you came to the broken end. Is that correct?

A. Yes, sir.

Q. Now, your testimony,——

(Testimony of Stanley H. Christensen.)

Mr. Morrow: And I think this will clear it up, your Honor.

Q. —is that 200 feet from the broken end the cable was badly scarred, the steel sheathing was scarred? A. Yes, sir.

Q. Shiny? A. Yes.

Q. And then for another thousand feet in there was damage to the cable, is that correct?

A. Well, I said——

Q. That makes 1,200 feet, doesn't it?

A. Yes, but I said 500 feet in there, too.

Q. All right. Do you want to add another 500 feet from the broken end? A. Yes.

Q. All right. Then you've got 1,700 feet, is that right? A. Yes.

Q. That the cable from the broken end was damaged or showed [229] evidence of damage in one way or another for 1,700 feet from the broken end? A. Well,——

Q. Is that your testimony? A. Yes, sir.

Q. All right.

Mr. Morrow: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Mikkelborg: The libelant will call Captain John H. Bowen.

The Court: Come forward and be sworn as a witness.

JOHN H. BOWEN,

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mikkelborg): Would you state your name, sir?

A. John H. Bowen.

Q. Your address?

A. 1029 Summit Avenue North, Seattle.

Q. What is your occupation or position? [230]

A. I'm the captain of the Army's cable repair ship Colonel Basil O. Lenoir.

Q. How long have you held that position, Captain?

A. I've been captain since 1951, February.

Q. By whom are you employed?

A. At present by the United States Army Transportation Terminal Agency, Seattle.

Q. Do you have any relationship to the Alaska Communication Service?

A. Yes. We work—operate the ship in support of their submarine cable requirements.

Q. Do you hold any licenses, Captain?

A. Yes, I have a master of oceans with a limit of 1,000 tons.

Q. Any other licenses?

A. It also is for mate of oceans unlimited.

Q. I didn't hear the last part of your answer.

A. Unlimited.

Q. What sort of vessel is the vessel under your command?

(Testimony of John H. Bowen.)

A. It's a cable repair ship, 164 foot in length, 37 foot in breadth, diesel propulsion, triple screw, built for the express purpose of laying and repairing submarine cables.

Q. How long have you been engaged in laying and repair of submarine cables? [231]

A. I joined that ship in 1944 and have been engaged constantly with one exception, I was away from the ship for about a year.

Q. Was your employment during this time out of the port of Seattle or around the port of Seattle?

A. Yes, sir.

Q. How long have you been employed around the Seattle waterfront?

A. On this ship since '44 and prior to that time sailing since 1942.

Q. Would you describe—you have given some description of the Lenoir. Would you describe her complement and equipage?

A. Yes, sir. She has nine officers, a cable foreman, fifteen civilian crew members, and we supplement the crew with military personnel up to an additional seven or eight people.

Q. Do you recall your work in the Lenoir during March of 1955? A. Yes.

Q. What was the nature of that work?

A. We were engaged in a submarine cable repair on the submarine cable extending from Seattle to Fort Lawton.

Q. Are you familiar with the area in which that repair was performed? [232]

(Testimony of John H. Bowen.)

A. Yes.

Q. Had you been there at any time or done work in that area prior to March of 1955?

A. Yes. We laid the cable initially in 1949 and had a subsequent repair in February of 1953.

Q. I see. Were you in the ship in 1949 when it laid the cable? A. Yes.

Q. What was the date you commenced repair of the—I believe you said Seattle-Fort Lawton cable in March of 1955. What date was that work commenced?

A. We commenced to work on that cable repair on March the 23rd, 1955.

Q. Did that involve picking up or recovery of the cable? A. Yes, sir.

Q. Had you ever picked up or recovered that cable before that time? A. Yes.

Q. When?

A. It was broken I believe in February of 1953 and we had a similar repair to perform at that time.

Q. During your repair in 1953, did that involve the relaying of the cable? A. Yes.

Q. Do you know the position in which the cable was relaid [233] after its repair in 1953?

A. Yes. Not so specifically that I could state its coordinates in latitude and longitude, but I know the general area in which it was put back.

Mr. Mikkelsen: I ask that the witness be furnished what has been marked and admitted as I

(Testimony of John H. Bowen.)

believe Respondent's A-1, the Coast and Geodetic Survey Chart 6449.

The Court: It has been admitted and it is the first one of those charts, No. 6449.

(The exhibit was handed to the witness.)

Q. (By Mr. Mikkelborg): Now, handing you what has been admitted in this case as Respondent's A-1, do you recognize that?

A. Yes, I recognize it as the Coast and Geodetic Chart 6449 of Elliott Bay and adjacent areas.

Q. Does it contain any information regarding the cable area which you have mentioned?

A. Yes, sir.

Q. What does it show with respect to cable, if anything?

A. It indicates a cable area west of Pier 57.

Q. Examine that cable area, Captain, and state whether or not, or if you are able to state, whether or not the cable that you relaid in 1953 was laid in or around the cable area marked on the chart.

A. It came back within the boundaries of the cable area marked on the chart.

Q. Very well. When did you next perform repair work on that cable in that area?

A. In March of '55.

Q. When did you first learn of the necessity or the break of that cable in March of 1955?

A. I don't recall exactly. We were told to go and repair the cable on March 23rd. However, I am aware that I knew of it before that time. Inasmuch as the cable went out on the 21st, it would

(Testimony of John H. Bowen.)

have had to have been either the 21st or the 22nd.

Mr. Morrow: I object to that part of the answer which is a voluntary statement.

The Court: The objection is sustained.

Mr. Morrow: Inasmuch as the witness has——

The Court: The reasoning of the witness will be stricken and the Court will disregard it.

Q. (By Mr. Mikkelborg): Can you state when the repair job or the assignment first came to your attention?

A. I have it recorded in the log of that period, in the ship's log of that period. If I could refer to that I could tell you exactly.

The Court: Let him see that exhibit. What exhibit number is it? Will you describe what it is [235] again, Captain?

A. It's the ship's log, sir, for the period 1955.

The Clerk: Exhibit A-3, your Honor.

Mr. Mikkelborg: I believe the witness is referring to what has been marked——

The Clerk: Respondent's Exhibit A-3.

The Witness: Respondent's Exhibit A-3, sir.

The Court: It has been admitted as Respondent's Exhibit A-3. It is a log book.

(The exhibit was handed to the witness.)

Q. (By Mr. Mikkelborg): When did the Lenoir under your command proceed and commence activities in connection with the repair of the Seattle Fort Lawton cable?

A. I have a log entry here under 1050, "Finished testing final end into number one tank." That

(Testimony of John H. Bowen.)

refers to another cable. Immediately following that is the entry, "Received official word from the main office that the Seattle-Fort Lawton cable has fault in it and ship will cease operations of coaxial cable work and make preparation to make repair on telephone cable."

At 1100, the time on the 23rd of March, "Crew securing gear and singling up to shift to regular berth."

Q. The log states "Received official word"?

A. Yes, sir. [236]

Q. Under what time is that entry made?

A. It's immediately following an entry of 1050. There is no time recorded——

Q. On what date? A. On March 23, 1955.

Q. Did you receive any unofficial word prior to that time that you can recall?

A. I did, yes.

Q. Do you recall when you received any unofficial word?

A. Again I can't recall exactly. It was probably the day before.

Q. Captain, were you in charge of the repair job of the Seattle-Fort Lawton cable?

A. Yes.

Q. Would you describe to the Court the conduct of that repair job?

A. Yes, sir. On the 23rd of March we received word shortly before noon and on the 24th——

The Court: At this time we will take a ten minute recess.

(Short recess.) [237]

Wednesday, August 20, 1958.

After midafternoon recess.

(All parties present as before.)

JOHN H. BOWEN,

resumed the stand.

The Court: You may proceed. All are present.

Mr. Mikkelborg: May we have the last line or two of testimony read?

The Court: That will be done.

(The reporter read back as follows:

“Q. Would you describe to the Court the conduct of that repair job?

“A. Yes, sir. On the 23rd of March we received word shortly before noon and on the 24th——”.)

A. To continue——

The Court: Yes, resume that same sentence.

A. On the 24th we loaded nine-tenths of a mile of the same type of cable from a storage area at Todds Plant B and proceeded to Pier 57 to begin repair on the Fort Lawton-Seattle submarine cable.

Q. (By Mr. Mikkelborg): Captain, before proceeding further with your repair, would you describe the kind of cable with which you were concerned in that repair job, the kind of cable we're talking about here today?

A. Yes, sir. The cable is known technically as 26 pair, [238] 19 gauge. That refers to the——

The Court: 26 pair, 19 gauge?

A. Gauge.

(Testimony of John H. Bowen.)

The Court: Which means what?

A. That refers to the conducting wires in the center.

The Court: Do you mean the size of them, or what?

A. Yes. There are 19—I beg your pardon, 26 pair. That would be 52 independent copper conductors in the center.

The Court: 19 gauge, what does that mean?

A. That's the size, the diameter of the——

The Court: Each wire?

A. Each wire, sir.

The Court: It was 26 pair, 19 gauge cable?

A. Electrical conductors.

The Court: Electrical conductor cable, is that what it was, or something else?

A. Yes, sir.

The Court: That is a proper way of describing it, is it, electrical conductor cable, or is that——

A. That's the central portion of the cable, sir. I could go on with my explanation——

The Court: You may proceed. [239]

A. Those copper conductors are insulated from one another by paper insulation.

The Court: I have heard about copper conductors. Did it have some of them?

A. Those are copper conductors, sir.

The Court: These wires?

A. Those wires are copper.

The Court: You may inquire.

A. They are insulated from one another by

(Testimony of John H. Bowen.)

paper insulation. There is a lead sheath over the outside of this group of copper conductors. It would appear as a soft lead pipe. There is jute padding over the outside of the lead sheath. There are 21 steel armor wires spiraled over the outside of that jute. There is an additional coating of tarred jute over the outside of the steel armor wires. That is a complete description of the cable.

The Court: You may proceed.

Q. (By Mr. Mikkelborg): Now would you proceed to describe the repair job that you conducted on that date? I believe you said the——

A. On the 24th we picked up the repair cable from Todds Plant B. That was nine-tenths of a mile we loaded aboard the ship,—expecting some of the cable to be damaged we would need some repair cable to work with,—and moved over to Pier 57. I believe on the following morning [240] we cut the cable where it enters the sea wall between Pier 57 and Pier 56. At that point the cable was stretched out tight from the hole in the sea wall toward the bay. Its normal position would be hanging straight down from the hole in the sea wall to the bottom of the bay. This indicated that it had been pulled out of position and drawn tight at the sea wall.

We cut the cable at its entrance to the sea wall and took the end aboard the ship over a drum and picked it up. As it comes off the drum on the in-board side we coil it in the ship, so——

(Testimony of John H. Bowen.)

Q. Which end of the ship does this cable come aboard the ship on the drum?

A. On the forward end of the ship. And we picked the cable up toward the fault, coiling it up in the ship as we went, and we picked up to a broken end.

Q. How far out did the ship go before the broken end was taken aboard?

A. I believe that was approximately three thousand four hundred and some odd feet.

Q. Is there a record of the repair job?

A. Yes, there is.

Q. What record is that?

A. In the ship's log.

Q. Do you have that log before you? [241]

A. Yes.

Q. What exhibit marking is on that log?

A. Respondent A-3.

Q. Does Respondent's A-3 have a record of the position in which the inshore broken end of the cable that you have just described, the position in which that was picked up? A. Yes, sir.

Q. What is that position?

A. Latitude 47 degrees 36 minutes 29 seconds north, longitude 122 degrees 21 minutes 8 seconds west. It indicates a depth of thirty fathoms.

Q. The depth of thirty fathoms, is that the depth of the water in the position in which the broken end was reported as having been brought up? A. Yes, sir.

Q. What did you do next, Captain?

(Testimony of John H. Bowen.)

A. Having the broken end in, we set about to raise the other broken end, that one coming from Fort Lawton towards Seattle.

Q. How did you set about that?

A. We rigged a grappling device and lowered that onto the bottom and dragged for the cable back some distance from the end of the cable so that the cable would not slip through the grapnel after it had hooked the cable.

Q. Did you move your ship from the position in which you [242] picked up the inshore broken end before you began this grappling?

A. Yes, sir.

Q. In what direction?

A. We moved slightly to the north and to the west.

Q. And did you find the other segment of the cable? A. Yes, we did.

Q. How was that done?

A. We hooked it the first drag with the grapnel as we pulled the grapnel along with the ship and raised it to the surface, brought it up to the bow of the vessel.

Q. What did you bring up to the bow of the vessel?

A. The cable, the submarine cable coming from Fort Lawton.

Q. Was it the end of the cable?

A. It was back some distance from the end.

Q. And then what did you do?

A. We cut the cable at that point where it

(Testimony of John H. Bowen.)

was hooked over the grapnel and tested it toward Fort Lawton to see that all the electrical conductors were good.

Q. What was the result of the test?

A. It indicated that all of the conductors were not good, and we picked up additional cable toward Fort Lawton to try and cut out those faults.

Q. What was done next?

A. At the time we picked up sufficient cable to clear the [243] cable of faults our office in the meantime had informed us over the radio that they wanted a minimum of eighteen good pair. We were pressed for time and could not correct all the cable faults, and they had to have a minimum of eighteen good pair.

Q. Why were you pressed for time, Captain, if you know?

A. We had another cable job pending which was quite important and expensive scheduled and we had to get on with that.

Q. Will you proceed with your description of the repair?

A. We picked the cable up to a point, cutting it at frequent intervals and testing it, until we found we had enough conductors to make 22 good pair. At that time we spliced the repair cable that we had loaded from Todds Plant B into the ship onto the Fort Lawton end and paid it back toward Pier 57.

Q. Did you observe the cable as it was picked

(Testimony of John H. Bowen.)

up by the Lenoir, both the inshore end and the off-shore segment? A. Yes, sir.

Q. Would you describe the condition of the inshore end as you observed it?

A. My recollection of that from my vantage point was that the outer jute was torn off the cable for a distance of 500 feet from that end; that the steel armors were scored badly for a distance of 100 feet from the end. [244]

Q. How many cable repair jobs do you estimate that you have performed, Captain, in your experience?

A. It would be difficult for me to say offhand, Mr. Mikkelborg. I think our records at present indicate we have completed 185 cable operations. Some of those deal with the laying of new cable, but the majority would deal with the repairing of submarine cables. Those cables interrupted by ships' anchors or fish trap anchors I think would be something in the neighborhood of fifteen or twenty repairs of that nature.

Q. What position did you find the broken cable in relative to the cable area which you have noted on Respondent's Exhibit A-1, the Coast and Geodetic Survey chart?

A. At the time we picked up the cable we found it north of that area.

Q. How far north?

A. I don't recall exactly, Mr. Mikkelborg.

Q. From the positions in which you located the cable and its condition as you observed it did you

(Testimony of John H. Bowen.)

draw any conclusions based on your cable repair experience, any conclusions with reference to what had happened to this cable or how it had been disturbed or if it had been disturbed from its original position? A. Yes.

Q. What were those conclusions? [245]

A. I concluded that a ship's anchor had probably hooked the cable and had dragged it along a distance and then broken the cable.

Q. Did you conclude that it had been broken in the position in which you laid it?

Mr. Morrow: I object to that as leading.

The Court: Sustained. Change the form of the question, Counsel.

Q. (By Mr. Mikkeltorg): Do you have an opinion, Captain Bowen, with respect to the position in which you found the cable and the location in which you last laid that cable, do you have any opinion in that connection? A. Yes.

Q. What is that opinion?

Mr. Morrow: Wait a minute. I object to that as not being a subject of expert testimony. The Alaska Communication System has the exact location of the cable when it was relaid in 1953, they have the exact location where this cable was found following the break in 1955, and I don't believe that the witness should express an opinion upon those relative matters until the basic facts are established upon which to draw a conclusion or an opinion.

Mr. Mikkeltorg: If the Court please, the cap-

(Testimony of John H. Bowen.)

tain is qualified as a man of extensive experience [246] in cable repair and has devoted his career for years to the repair of cables.

The Court: You might ask him how many different cable repair jobs he has formanned or directed.

Mr. Mikkelborg: I did ask that, your Honor, and he——

The Court: How many different ones?

Q. (By Mr. Mikkelborg): I'll ask again, Captain, how many different cable jobs have you performed, cable repair jobs have you performed or participated in during your command of the cable repair ship Lenoir? Your best estimate.

A. My best estimate for the period in which I've been captain of the cable ship Lenoir would be about forty repairs.

Q. Did you participate in other cable repair jobs before you were responsible as captain?

A. Yes, sir.

Q. And is that any substantial number in addition to that forty?

A. Yes, sir. I was first officer of the ship and participated in all the cable operations in which she was involved with the exception of the one year I was off the ship from the time it was built in '44.

Q. I believe you testified you were in the [247] Lenoir since 1946, is that not right?

A. I joined the ship in '44. If I said '46 it was

(Testimony of John H. Bowen.)

a mistake. I joined the ship in '44 and then I was absent from the ship in '46.

Q. Can you estimate how many repair jobs you have participated in since you first joined the cable repair ship Lenoir?

A. I think close to 100 cable repairs.

The Court: What is the question objected to? Mr. Reporter, will you read it.

(The reporter read the question as follows:

“Q. Do you have an opinion, Captain Bowen, with respect to the position in which you found the cable and the location in which you last laid that cable, do you have any opinion in that connection?

“A. Yes.

“Q. What is that opinion?”)

Mr. Morrow: I object to the form of the question.

The Court: The form of the question is too indefinite. What is the subject of your inquiry as to which you ask him to express an opinion? [248] Make your question clear on that point.

Q. (By Mr. Mikkelsen): Captain Bowen, do you have any opinion as to how much if any the cable was disturbed based on the location in which you found it and your knowledge of the place in which it was laid? Last laid, I should say, by you.

A. I could not state how much it had been moved, no.

Q. Had it been moved at all?

(Testimony of John H. Bowen.)

A. I'm quite sure it had been moved some in a northerly direction.

The Court: I wish Counsel now interrogating to form the habit of conducting the examination himself. If he does not do that, the tendency in the future in his work will be that he does not know whether to use his own line of interrogation or that of somebody else. I ask him to conduct his examination himself. If at the end of a heading of a subject you feel you would like to consult with co-counsel, do that very quietly and very briefly, and then resume the examination and go on. I ask that you not seek or permit interruptions.

Mr. Mikkelborg: We will commence a new phase, if the Court please.

Q. (By Mr. Mikkelborg): Captain, have you been in charge of the Lenoir continuously since first assuming command? A. Yes, sir. [249]

Q. Do you know whether the Lenoir has been operated in Alaska Communication System cable work during that entire time?

A. Yes, I do know.

Q. And was it so operated with Alaska Communication Service work during the time which you have commanded the Lenoir?

A. Not all the time, no, sir.

Q. What other work has it had during your command?

A. We have worked on charters for American Tel. & Tel. and the Coast Guard and Bureau of Federal Prisons.

(Testimony of John H. Bowen.)

Q. Directing your attention to a charter to American Tel. & Tel., what period of time was involved in that charter?

A. In 1956 we were chartered for a period of one month and again in '57 approximately one month.

Q. Are you familiar with the arrangements in that charter?

A. I had a copy of the charter furnished to me as the government's representative aboard the vessel.

Q. What was the charge to American Tel. & Tel. for the use of the Lenoir?

Mr. Morrow: Objected to as a continuous effort to get in the terms of this charter party, a charter party which was a year later and which has no bearing and can have no bearing upon the question of damages.

The Court: Is it respecting this same cable [250] break or is it some collateral transaction?

Mr. Morrow: It's something collateral entirely, your Honor. It's a charter with the——

The Court: Does it concern a different break from the one about which this cause of action arose?

Mr. Mikkelborg: The question doesn't concern a break at all, it concerns the employment of the Lenoir under his command.

The Court: It is in connection with some job that is not related to this breaking that occurred in this case?

(Testimony of John H. Bowen.)

Mr. Mikkelborg: It is not directly related to the breaking in this case.

The Court: The objection is sustained.

Q. (By Mr. Mikkelborg): Captain, referring to the exhibit which has been marked Respondent's A-3, would you state whether or not that record shows the time logged for the Lenoir on the Fort Lawton-Seattle cable repair job?

A. Yes, it does.

Q. How much elapsed time is shown devoted by the cable ship Lenoir to the repair of the Seattle-Fort Lawton submarine cable?

A. We started on 1100 hours on the 23rd of March, 1955, and we completed the ship's portion of this work at 1000 hours on Tuesday, 29 March 1955. [251]

Q. Was the engagement of repair by the Lenoir completed at that time? A. Yes, sir.

Q. The 29th of March? A. Yes, sir.

Q. Was the cable repair job completed?

A. I do not know if the end back in the manhole on the street inside of Pier 57 was terminated at that time.

Q. Had the cable been relaid and fully connected up by that time?

A. The cable had been relaid, the end passed in through the sea wall and it was secured in the manhole. Whether or not it could be back in operation I would not know because I don't know when the end was terminated in that manhole.

(Testimony of John H. Bowen.)

Q. Your repair work was complete at that time, is that correct? A. Yes.

The Court: About how many more witnesses do you have, Counsel?

Mr. Mikkelborg: We have one.

The Court: One more?

Mr. Mikkelborg: If the Court please——

The Court: Can you finish with that one this afternoon in another half hour and this one? [252]

Mr. Mikkelborg: We are substantially completed with this witness at the moment. It depends——

The Court: I ask that you complete the libelant's case in chief within the next thirty minutes.

Mr. Mikkelborg: We will attempt to do so, if the Court please. At this time, if the Court please, the libelant by way of offer of proof advises the Court that the testimony of Captain Bowen, master of the Alaska Communication System cable repair ship, would show and prove that the Alaska Communication System——

The Court: Do you ask and offer to prove such and such facts? If so, will you state what it is you offer to prove?

Mr. Mikkelborg: I will do so.

The Court: Do that, if that is what you offer to do.

Mr. Mikkelborg: We offer to prove, if the Court please, that the testimony of Captain Bowen of the cable ship Lenoir would show that the Lenoir was actually chartered in March of 1956 for the sum of \$1,500 per day, which sum represented the actual

(Testimony of John H. Bowen.)

daily operational cost of the Lenoir to the Alaska Communication Systems as evidenced by the cost accounting figures computed by Sergeant O'Brien, who has been a prior witness in this matter, and which were prepared [253] during March of 1955, the same time in which the Lenoir was engaged in this particular job and at a time material and relevant to this action. We make this offer for the Court's consideration.

The Court: What is the attitude of respondent's Counsel?

Mr. Morrow: We object to it on the same basis we objected before, your Honor. The matter is irrelevant and immaterial as to the actual damage in this case.

The Court: The objection is sustained. In that connection the Court affords to Counsel the opportunity, if he has not already used it, to prove similar information with respect to what was done in the repairing of this particular break in this cable in March of 1955. Proceed.

Mr. Mikkelborg: You may cross examine, Counsel.

Mr. Morrow: I would like to have some exhibits marked.

The Court: Which ones? You are entitled to all of them if you wish them. Which ones do you wish?

Mr. Morrow: I would like first of all to put in evidence the cable report. It's called the deck cable report of the vessel Lenoir.

(Testimony of John H. Bowen.)

The Court: Assemble all the exhibits, Mr. Clerk, and let Counsel have them now. [254]

(Exhibits were handed to Mr. Morrow.)

Mr. Morrow: I wish to have exhibits marked.

The Clerk: It will be Respondent's A-4.

(Deck cable report was marked Respondent's Exhibit No. A-4 for identification.)

Mr. Morrow: I will offer that exhibit in evidence, being the deck cable report of the cable ship Basil O Lenoir for the period in question, namely, March 23, 1955 to March 29, 1955 inclusive, one of the documents which came off the vessel Lenoir and was produced at a recent deposition of Captain Bowen.

The Court: The dates and the month are what, the 23rd to——

Mr. Morrow: The 23rd to the 29th of March, 1955.

The Court: Any objection?

Mr. Mikkelborg: No objection.

The Court: This report, A-4, is now admitted.

(Respondent's Exhibit No. A-4 for identification was admitted in evidence.)

Mr. Morrow: I would like to have produced and marked for offer into evidence at this time the cable report of the ship Lenoir for February, 1953 damages to the Fort Lawton-Seattle cable.

The Court: Have you demanded that before?

Mr. Morrow: I have seen it before, yes, your Honor.

The Court: Have you demanded it before?

(Testimony of John H. Bowen.)

Mr. Morrow: Yes, and I have asked——

The Court: Who has it?

Mr. Morrow: Captain Bowen has it, or did have it the last time I saw it.

The Court: You should ask Counsel for it.

Mr. Morrow: I meant to ask Counsel for it.

The Court: Then demand is made of Counsel for the libelant for that material. Do you have it ready to produce now?

Mr. Mikkelborg: Yes, the witness will produce it.

The Court: Very well.

The Witness: May I be excused?

The Court: Yes, you may step down. Try to finish so that you will have a reasonable time to take up the other witness and finish by 4:30.

(The witness produced a document.)

The Clerk: It will be marked Respondent's Exhibit A-5.

(Cable report was marked Respondent's Exhibit No. A-5 for identification.)

Mr. Morrow: I would like to have produced [256] and marked in accordance with a previous request for production the log of the cable ship Lenoir covering the 1953 cable break of the Seattle-Fort Lawton cable.

The Court: January of 1953?

Mr. Morrow: February of 1953, your Honor.

The Court: A-5 commences in January, or is it February? A-5 relates to January or February of 1953?

(Testimony of John H. Bowen.)

Mr. Morrow: The period covered in the log in question——

The Court: A-5, referring to A-5.

Mr. Morrow: Yes, is December, 1952 through March, '53.

The Court: I think you are talking about something different. That is probably A-4 that you refer to.

(Pilothouse log book was marked Respondent's Exhibit No. A-6 for identification.)

Mr. Morrow: No, this is A-6, the 19——

The Court: Hand that exhibit to Counsel, A-6. Demand has been made for a log book.

Mr. Morrow: Yes. I have it here, your Honor, the 1953 log of the Lenoir.

The Court: That has been marked as Respondent's Exhibit A-6. There had previously been marked [257] Respondent's Exhibit A-5, which is supposed to refer to January cable damage.

Mr. Morrow: I offer the 1953 log in evidence, it being Respondent's Exhibit A-6.

The Court: Is there any objection?

Mr. Mikkelborg: No objection.

The Court: It is admitted.

(Respondent's Exhibit No. A-6 for identification was admitted in evidence.)

The Court: Have you offered A-5?

Mr. Morrow: A-5 has been offered.

The Court: Is there any objection?

Mr. Mikkelborg: No objection.

The Court: Admitted.

(Testimony of John H. Bowen.)

(Respondent's Exhibit No. A-5 for identification was admitted in evidence.)

Mr. Morrow: That's all the exhibits I have to produce for marking at this time, your Honor, for use with this witness. Now I would like to have the witness handed first the permit for installation of this cable by the United States Army, being Libellant's Exhibit 5.

(The exhibit was handed to the witness.)

The Court: Proceed.

Mr. Morrow: And also Respondent's Exhibit A-1, being the chart of the cable area, 6449.

(The exhibit was handed to the witness.)

Cross Examination

Q. (By Mr. Morrow): Now, Captain Bowen, with the permit before you, Exhibit 5, and the chart, can you establish the original position and line of the Alaska Communication's cable between Seattle and Fort Lawton?

A. I could with the proper instruments, yes.

Q. All right.

The Court: How much time will this take?

Mr. Morrow: This will take——

The Court: Can you not ask him what it is with reference to the——

Mr. Morrow: Well, I can ask him what the bearing is from the sea wall at Pier 57, but it will not mean anything, your Honor, unless it is drawn on the chart.

The Court: You can have him draw it on there

(Testimony of John H. Bowen.)

during some recess period. I want the libellant's case in chief rested this afternoon. It ought to be done by 4:30.

Mr. Morrow: This being in the nature of the respondent's case, if I have the privilege of recalling [259] this witness——

The Court: You may do that.

Mr. Morrow: I would like to.

The Court: You may do that, but I do not wish to receive experimentations in court. Have him make the experimentation on the outside, if it is permitted, if it is respecting an exhibit in court. You cannot mark up an exhibit outside of the courtroom without the permission of the Court during recess periods. Is there anything else you wish to ask this witness?

Mr. Morrow: Yes, your Honor, but in connection with your Honor's statement I would like to have permission to have this witness put——

The Court: Is there any objection to that, to plot this position where he first laid the cable at a certain time?

Mr. Morrow: There are three things I would like to have the witness put on this chart, the original position of the cable in 1959——

The Court: '49, you mean '49.

Mr. Morrow: Thank you. '49. I'm sorry. The position of the cable when relaid in 1953, and the two positions of the broken ends of the cable in March, 1955.

The Court: Is that clear, Captain? [260]

(Testimony of John H. Bowen.)

A. That is clear, sir.

The Court: Very well. Is there any objection to that being done during a recess period?

Mr. Mikkeltborg: Insofar as the witness is able to do it. The witness has testified on direct that he does not——

The Court: Then I ask you to do that if you can at the next recess. Proceed.

Mr. Morrow: Thank you.

Q. (By Mr. Morrow): Captain Bowen,——

The Court: You may do that on that exhibit mentioned by Counsel.

Q. (By Mr. Morrow): Captain Bowen, you have expressed an opinion to the effect that the Fort Lawton-Seattle cable had been disturbed and had been moved, and I think you said slightly. Now, is it true that your opinion was based upon your observation of the cable? Was that one of the factors you took into consideration?

A. Yes, that may have influenced my opinion.

Q. And your testimony of your observation of the cable was that the outer jute was torn for a distance of 500 feet from the end and scored another hundred feet? A. No, sir.

Q. What is your testimony?

A. I'll repeat it, sir. The outer jute covering was peeled [261] off for a distance of 500 feet.

Q. Yes.

A. The last 100 feet of which the steel armors were also badly scored.

Q. I see.

(Testimony of John H. Bowen.)

Mr. Morrow: That's all, your Honor. On my case I will want to establish these different positions.

The Court: Do you wish this witness to remain in attendance?

Mr. Morrow: Yes, subject to marking the chart.

The Court: Is there anything further from this witness?

Mr. Mikkelborg: No, your Honor.

The Court: You may be excused.

(Witness excused.)

The Court: Call the libelant's next witness.

Mr. Mikkelborg: The libelant will call Captain Howell.

ALBERT S. HOWELL

called as a witness in behalf of libelant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Mikkelborg): Will you please state your full name, sir? [262]

A. Albert S. Howell.

Q. What is your address?

A. 503 West McGraw Street, Seattle.

Q. What is your occupation, sir?

A. I'm retired.

Q. What was your occupation prior to your retirement? A. Master mariner and pilot.

Q. How long were you occupied in those capacities? A. Which one?

(Testimony of Albert S. Howell.)

Q. Well, start with master mariner.

A. Well, I received my master's license in 1910, and in 1912 I was in command of a ship and I was in command of successive ships until 1922, and then I come ashore and went to be a pilot, and for '22 to '45 I was a pilot here on the Sound.

Q. What type of ships have you commanded, Captain?

A. Well, principally freighters, 450, 475 feet.

Q. In connection with your—by the way, Captain, how many years were you occupied as a pilot?

A. Twenty-two and a half.

Q. And where were you so occupied?

A. Puget Sound and adjacent inland waters including Lake Washington.

Q. What type of ships did you handle during your service as a pilot? [263]

A. Everything that was floating, airplane carriers, torpedo boats, battleships, freighters and tug-boats and anything that needed a pilot.

Q. Did that include passenger ships?

A. Yes, if they needed one I was there.

Q. How many ships do you estimate that you've handled as a pilot?

A. Well, from twenty to thirty a month.

Q. For how many years?

A. The total time, twenty-two and a half.

Q. Have you had any military service, Captain?

A. Thirty-nine months in the First World War, run an ammunition ship from Norfolk to France.

Q. And what service in World War II, if any?

(Testimony of Albert S. Howell.)

A. I was inducted into the Coast Guard, Lieutenant Commander.

Q. And what service did you perform in the Coast Guard?

A. They put me on as a test pilot to run the destroyers they were building at Todds and the air-plane carriers they were building in Tacoma.

Q. What license do you hold at the present time, Captain? A. Ocean master unlimited.

Q. Do you recall how many issues of that license you have had?

(Witness refers to document.)

The Court: Do you admit this witness' [264] qualifications?

Mr. Morrow: We admit he is a qualified master Mariner. He has held his——

A. Eight and ten, eight issues and the tenth license.

Q. (By Mr. Mikkeltorg): Have there ever been any actions against you or your license, Captain?

A. No, none.

Q. All right. Captain Howell, assuming that a ship some 320 feet overall in length of a passenger ship design, 4,032 gross tons, with a beam of 48 feet, powered by reciprocating engines, conventional single screw, assume that such a ship is attempting a landing at Pier 64 in Seattle, and assume further that the landing is required or attempted during a southerly gale of winds of 35 and up to 40 miles an hour with choppy, rough surface conditions from such wind; further assume

(Testimony of Albert S. Howell.)

that the tide has been flooding and is approximately high water with a 9.3 foot tide; further assume that the docking is required to be made on the south face of Pier 64 with this southerly gale and that the pier has a west face of approximately equal length with that of its south face, and assume that south of the required mooring at Pier 64 at a distance of some seven or eight hundred feet is a marked and charted cable area. Assume further that such a ship as I have described attempts to dock [265] using its starboard anchor as it approaches the dock, having turned from its approach out of the northwest, having turned to its port side or left from the southernmost point of its approach, which would have been somewhat upwind or further into the gale from Pier 64.

Captain Howell, based on your experience and knowledge of ship handling and seamanship do you have an opinion as to whether or not such an attempt to land such a ship in this manner under those conditions represents the proper maneuver of a reasonably prudent ship master and ship handler?

Mr. Morrow: I object to the form of the hypothetical question because it includes facts I think which are not in evidence. It is rather long. I haven't had a chance to——

The Court: That objection is overruled. Do you object to it on the ground that the concluding question part of it is leading, the statement of the con-

(Testimony of Albert S. Howell.)

cluding part of the question, that part which is the question?

Mr. Morrow: Yes.

Mr. Mikkelborg: I'll rephrase that, if the Court please.

The Court: It is just those last few words.

Mr. Mikkelborg: Yes, your Honor. [266]

The Court: You could ask him first if he has an opinion regarding the matter of whatever the aspect of it is you are inquiring about.

Mr. Mikkelborg: Yes, your Honor, I should have done so.

Q. (By Mr. Mikkelborg): Captain Howell, under the circumstances which have been described in that question do you have an opinion with respect to the manner of docking such a ship?

A. Do you want to know how I would go about the job?

The Court: No. No, that is not the question. He wants to know if you have an opinion. You will have to say what aspect of the opinion you wish.

Q. (By Mr. Mikkelborg): Do you have an opinion in connection with the——

The Court: You will have to state on what question.

Q. (By Mr. Mikkelborg): Do you have an opinion, Captain, on the facts posed to you in that hypothetical question?

The Court: As to what?

Q. (By Mr. Mikkelborg): As to the maneuver in docking by the ship outlined in the question.

(Testimony of Albert S. Howell.)

The Court: Do you mean as to whether it was a safe docking, safe for the cable or a necessary maneuver, or what do you mean? [267]

Mr. Mikkeltorg: As to whether that was a prudent maneuver.

The Court: You may ask him that.

Q. (By Mr. Mikkeltorg): Do you have an opinion as to whether that was a prudent maneuver?

A. I would never have let the ship——

The Court: Just answer yes or no.

A. Yes, I have, yes.

Q. (By Mr. Mikkeltorg): What maneuver or maneuver of docking——

The Court: No, he has not stated what his opinion is yet.

Mr. Mikkeltorg: Very well.

Q. (By Mr. Mikkeltorg): Would you state your opinion, Captain?

A. I would never get upwind on the dock that I was going to dock at. You can't control the ship that way.

Q. Would you describe the maneuver that you would undertake under those circumstances?

A. I would come in on an angle to the corner of the dock where I was going in and make a landing on the face of the dock, run a headline around the corner of the dock and break around the corner, which I've done hundreds of times down on the Seattle waterfront.

Q. Would such a maneuver cause you to come south of the [268] pier and upwind?

(Testimony of Albert S. Howell.)

A. Oh, no, no, no, no, that's out, you don't do that business at all. You just get up abreast of the pier and let her sag over, let her sag over and make a landing on the corner of the dock.

Q. From what direction would you approach the pier under those circumstances?

A. Oh, at about a forty-five degree angle.

Q. From what direction?

A. Well, it would be about west, it would be about west, but never get downwindward of the dock where you're going in. That's the dock where you're going in, and if you get up there the wind will take a hold of you and you can't control her then, it will add power to you and get you going, and if sagging in on the corner of the dock you can't control her bow with the wind blowing her over, just drop her anchor on the foot. That way you'll line her up on the face of the dock and you'll get around the corner of the dock, and there's nothing to it.

Q. In any event would you make an approach to the south of the dock and come downwind?

A. Oh, no, that's out. I never did that. That was a single screw ship.

Q. In your opinion, Captain, under those circumstances [269] would an approach from the upwind side of the dock or from the south or southeast or southwest be a proper or an improper maneuver?

A. It would be very difficult to handle the ship that way. I wouldn't be able to do it myself. I'd

(Testimony of Albert S. Howell.)

never get in that position because I couldn't handle the ship. Coming into that dock which you're talking about you're making a port landing.

Q. By "handling the ship" do you mean controlling the ship?

A. That's right, keeping control of the ship instead of letting the ship control you.

Mr. Mikkelborg: You may cross examine.

Cross Examination

Q. (By Mr. Morrow): Captain Howell, do you have in mind docking the ship on the face of the dock, or——

A. Absolutely, that's right. With a southerly wind we do it all the time.

Q. Do you know whether or not the dock would accommodate the discharge of passengers on the face of the dock?

A. You don't need to discharge them there. You're going into the berth around the corner, but that's only preliminary to making the landing. Surely you can discharge them on the face of the dock. All you've got [270] to do is put out a gangway.

Q. In other words, what you would do would be to put a line onto the dock and then warp the ship around?

A. That's exactly what we used to do.

Q. When did you do that, Captain?

A. All the time I was here, and I've made a

(Testimony of Albert S. Howell.)

landing on every dock on the Seattle waterfront, not once but dozens of times.

Q. You've been retired since 1945, have you?

A. That's right.

Q. Did you ever dock a ship at Pier 64?

A. I have, yes, that's right.

Q. Now, you've been on the Seattle waterfront for a good many years, haven't you, Captain?

A. Twenty-two and a half.

Q. And you've undoubtedly observed the Princess boats of Canadian Pacific dock there many times?

A. That's right.

Q. And you've undoubtedly seen them dock in a southeast wind, have you not?

A. That's right, that's right.

Q. Now, did you ever make any complaint or protest as to that particular method of docking which they use?

A. No, because most of them, when the big boats was on they were twin screw, and that's quite simple to do. [271]

Q. I see.

A. But with a single screw ship, that's a different matter.

Q. But at least you never made any complaint as to docking in the manner which the Princess boats usually docked, have you?

A. Any complaint?

Q. Yes.

A. No, I had no complaint to make. They were doing the docking, not me.

(Testimony of Albert S. Howell.)

Mr. Morrow: I have no further questions.

Mr. Mikkelborg: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Mikkelborg: The libelant has no further witnesses.

The Court: Does it rest its case in chief?

Mr. Mikkelborg: May I have one moment, if the Court please?

The Court: Yes. The exhibits, I call your attention that Libelant's Exhibits 1 and 2 and 5 and each and all of them have been admitted, but no other libelant's exhibits have been, and in particular Libelant's Exhibit 3 was admitted, was stricken and has not been readmitted, the objection to it was [272] sustained. Libelant's Exhibit 4 has not been admitted.

Mr. Mikkelborg: The libelant will reoffer all libelant's exhibits including Exhibits 3 and 4.

The Court: Do you make the same objection?

Mr. Morrow: The same objection.

The Court: As to 3 the objection is sustained. I would like to be reminded of what 4 is. I do not know what it is at this moment.

Mr. Mikkelborg: Libelant's Exhibit 4 was the duplicate original of a charter party agreement between Alaska Communication System and American Telephone & Telegraph.

The Court: It concerned a repair job which was not occasioned by this accident, is that right?

Mr. Mikkeltorg: It did not concern any repair job, if the Court please, it concerned——

The Court: What did it concern, then? This I understand is some kind of a repair job that is being sued for here. What did it concern then if it did not concern a repair job?

Mr. Mikkeltorg: This is indeed a repair which caused damages to the libelant with which we are concerned. Libelant's Exhibit 4 was a charter agreement reflecting the per diem cost of the cable ship employed in the repair concerned in this case, the per diem cost [273] of which was derived contemporaneously with the repair in this case and which was executed subsequent to the accomplishment of the repair in this case.

The Court: What is the objection?

Mr. Morrow: The objection, your Honor, is that it is a 1956 charter party between the government and a third party, and it has no relevancy or materiality in connection with the proof of the libelant's damages for repairs which were made in 1955.

Mr. Mikkeltorg: If the Court please, it is relevant and material to the proof of the libelant's damages in March of 1955 because the libelant here has adduced testimony particularly through Sergeant O'Brien to show that the cost per day figure to the libelant of the employment of the cable repair ship Lenoir was \$1,500 and that cost was adduced at the time including the time of the repair with which we are here concerned and was the figure used in a

charter made available to American Telephone & Telegraph on a cost basis, at no profit and at no loss to the libelant, on figures derived at the time in question here.

The Court: Does respondent's Counsel understand as I do that the libelant's Counsel has just said that the contract was made so that the repairs made necessary by the alleged accident here involved could be [274] accomplished.

Mr. Morrow: Could be what?

The Court: In effect that is what he says was the situation here, does he not?

Mr. Mikkelborg: No, if the Court please. May I clarify that? That is not my intention, to state that. It is the libelant's position with respect to libelant's proposed Exhibit 4 that libelant's proposed Exhibit 4 is an agreement reflecting the per diem cost of the Lenoir when made available to an outside agency; that that per diem cost to the government, no profit and no loss, was derived during the same period of time with which we are here concerned, the period of time in which the Lenoir was employed in the repair of the Seattle-Fort Lawton cable, and it is a true reflection of the per diem cost to the libelant of the Lenoir's employment. It is the same cost that was utilized in making the Lenoir available to the American Telephone & Telegraph Company.

The Court: I understood that was the situation previously and I understand it now, and the objection is sustained. I would like you satisfactorily to

yourself to assign a name to the document, Libelant's Exhibit 4.

Mr. Mikkelborg: The document is the Alaska Communication Service-American Telephone & Telegraph [275] Company time charter party for the cable ship Basil O Lenoir.

The Court: 1956?

Mr. Mikkelborg: Executed in 1956.

The Court: As I understand, the libelant rests. Is that right?

Mr. Mikkelborg: The libelant does rest, yes, your Honor.

The Court: How many witnesses does the respondent expect to call?

Mr. Morrow: I'll just count them up, your Honor.

The Court: Can you finish tomorrow? We had an assignment of a trial of two days. We have already used two days and the libelant has just now finished.

Mr. Morrow: Yes. I have the master of the Princess Louise, the chief and the second officer, and the man on the anchor windless, Mr. Stiles of Alaska Communication System, a brief witness for identification, and I have Captain Bowen.

The Court: You can finish tomorrow, can you not?

Mr. Morrow: I'll try my best, your Honor.

The Court: Very well. Court is recessed until tomorrow morning at 10:00 o'clock. Those connected [276] with this case may now retire.

Mr. Broz: May I address the Court, your Honor, briefly?

The Court: Before the recess you may do that.

Mr. Broz: If it please the Court, I request an excuse from further appearance in this trial, the government having rested.

The Court: Is there any objection?

Mr. Morrow: No objection, your Honor.

The Court: The Court has none.

Mr. Broz: Thank you, your Honor.

The Court: The recess now becomes effective.

(Thereupon, at 4:35 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Thursday, August 21, 1958.)

Thursday, August 21, 1958. 10:00 o'clock a.m.

(All parties present as before.)

The Court: In the case on trial are Counsel and the parties ready to proceed?

Mr. Morrow: Ready, your Honor.

Mr. Mikkelsen: Ready, your Honor.

The Court: The respondent may now proceed [277] with its case in chief.

Mr. Morrow: Your Honor, at this time I would like to have marked a list of respondent's exhibits.

The Court: You may do that.

Mr. Morrow: I have a list here, a typed list, which is marked up a bit but I think will be of assistance to the clerk or the Court in making reference to the exhibits. I believe the next number is A-7, the pilothouse log of the Princess Louise.

The Clerk: It will be marked Respondent's Exhibit A-7.

(Pilothouse log of Princess Louise was marked Respondent's Exhibit No. A-7 for identification.)

The Court: Will you call a witness to the stand, please, if you wish to proceed?

Mr. Morrow: Yes. I'll call Captain—there are more exhibits.

The Court: I wish to have a witness called.

Mr. Morrow: Very good. Captain Bowen.

The Court: The witness has already been sworn. He will resume the stand.

JOHN H. BOWEN

resumed the stand as a witness in behalf of respondent. [278]

The Court: What exhibits do you wish marked that have not been? Has this log book not been marked by the clerk of this court during this trial before?

Mr. Morrow: That's right, your Honor.

The Clerk: No, your Honor.

The Court: Pardon?

The Clerk: No, your Honor. I just marked it.

The Court: What is it?

Mr. Morrow: Pilothouse log of the Princess Louise.

The Court: Mr. Clerk, what clerk's number is assigned to this particular exhibit?

The Clerk: A-7, your Honor.

The Court: Do you offer A-7 in evidence?

(Testimony of John H. Bowen.)

Mr. Morrow: Yes, I do, your Honor.

The Court: Any objection?

Mr. Mikkelborg: No objection, your Honor.

The Court: It is admitted.

(Respondent's Exhibit No. A-7 for identification was admitted in evidence.)

The Clerk: Respondent's Exhibit A-8.

(Engine room log of Princess Louise was marked Respondent's Exhibit No. A-8 for identification.)

Mr. Morrow: The next exhibit—— [279]

The Court: Wait just a moment. The clerk here has something that is contained in an envelope. It is a larger envelope than the other one. It seems to have on the outside of the envelope these words: "Engine room log of the Princess Louise." Is that——

Mr. Morrow: Yes, your Honor. The log is falling apart, so I put it in the envelope and marked it on the outside.

The Court: The marking is now confirmed as A-8.

Mr. Morrow: I offer Exhibit A-8, the engine room log of the Princess Louise, in evidence.

Mr. Mikkelborg. The libelant has no objection, your Honor.

The Court: It is now admitted.

(Respondent's Exhibit No. A-8 for identification was admitted in evidence.)

The Court: Have you another exhibit at this time?

(Testimony of John H. Bowen.)

Mr. Morrow: Yes, your Honor.

The Clerk: It's marked A-9, your Honor.

(Port of Seattle map of Seattle Harbor was marked Respondent's Exhibit No. A-9 for identification.)

The Court: Do you have a name that you think [280] is suitable?

Mr. Morrow: Yes. A-9 is identified as the Port of Seattle map of Seattle Harbor.

The Court: Who made the map, if you know, what concern or organization, and by what authority was the proposed exhibit issued?

Mr. Morrow: It's from the files of the Port of Seattle.

The Court: So it is Port of Seattle map——

Mr. Morrow: Of the Seattle harbor.

The Court: And what is the number of that exhibit?

The Clerk: A-9, your Honor.

The Court: Do you offer that?

Mr. Morrow: I offer A-9 in evidence, your Honor, for the purpose of showing the pier numbers and the streets of the City of Seattle in order that the harbor and the piers may be identified as to pier number and streets.

The Court: That all could be done by putting a name of a pier that does not appear already on Chart 6449.

Mr. Morrow: Yes, there are no——

The Court: Then having a line ending up in a certain point pointing to that pier and giving it

(Testimony of John H. Bowen.)

some [281] additional name and you would not have this multiplicity of exhibits.

Mr. Morrow: Well, your Honor, I attempted just that and——

The Court: For instance, up to this moment I have not heard a single witness or a single voice refer in any way to any relationship between a dock or any one of these docks which have been mentioned in the evidence and what we all refer to every day as the Canadian Pacific Dock in Seattle, and I suspect that this vessel was making for that dock when it was trying to land because the vessels of this respondent have been using one dock known by a certain popular name by the public of Seattle for a number of years.

Mr. Mikkelborg: May I be heard, if the Court please? I respectfully submit to the Court that identification by such a name has been made in the record at this point.

The Court: Very well, then the Court omitted to note it and does not recall it having been done.

Mr. Mikkelborg: I respectfully object to the admission of the proposed Exhibit A-9 on the ground that it is not an instrument such as is already in evidence in the form of the Mercator projection Coast and Geodetic Survey charts which are extremely accurate. This article [282] now offered is a reproduction of some kind, apparently an enlargement or blowup of some other source, and there is no way of vouching for its accuracy. It is

(Testimony of John H. Bowen.)

unnecessary and in addition to material already in evidence in the form of documentary exhibits.

Mr. Morrow: May it please the Court, this is an exhibit which is admitted by the pretrial order and agreed that it should be admitted in evidence as a subject of the pretrial conference.

Mr. Mikkelborg: If that is the case, if the Court please, I am in error and I withdraw the objection.

The Court: Is there in respect to any exhibit a pretrial order effect different from that thing's effect on all the exhibits listed in it? My understanding of the pretrial order was that so far as authentication is concerned, those who approved the order and the Court in making it were all satisfied with the authenticity without any further proof.

Mr. Morrow: That's right.

Mr. Mikkelborg. That is correct, your Honor.

The Court: And that unless there was some other objection on substantial grounds and not on formalized grounds going to materiality or other competency relating to the merits of the exhibit, that the pretrial order would be sufficient and that such [283] sufficiency was only respecting the authenticity of the document, it did not determine the admissibility of the document.

Mr. Mikkelborg: That is correct. I withdraw the objection on the grounds stated. I'm seriously in error. That item was so identified. It is what it purports to be. However, the objection I do make at this time is as to the materiality or the

(Testimony of John H. Bowen.)

necessity of this in addition to the other charts already in evidence.

The Court: The Court usually regards the fact of ballooning an exhibit as a very important fact bearing on its admissibility. I do not see any unreasonable enlargement of scale in respect to this map, Mr. Mikkelsen, and the Court overrules the objection and does admit this exhibit in evidence.

(Respondent's Exhibit No. A-9 for identification was admitted in evidence.)

The Court: Now at this point for the Court's convenience would you try to recall the witness and the words of the witness who in the course of his testimony referred to one of these docks by a popular name?

Mr. Mikkelsen: It is my recollection that Colonel Rogers referred to the CPR Dock, that Mr. Langworthy made mention of the CPR Terminal and the Princess vessels' dock. [284]

The Court: Did any person relate that popular name to a dock bearing a number, referring to it by a number, in this case? If so, what was said in that connection? I want to be reminded of it. That was the point about it.

Mr. Mikkelsen: Yes. I believe the record will show——

The Court: That was the point about the Court's statement. I did not recall any identification of the dock in question with the popularized name of the dock used by this respondent company in Seattle.

Mr. Mikkelsen: Yes. If the Court please, those

(Testimony of John H. Bowen.)

witnesses mentioned referred to it as Pier 64 and also as the Canadian Pacific or CPR Dock, to the best of my recollection.

The Court: The Court will accept Counsel's recollection and displace the Court's previous lack of registering that information. The definite ruling on the offer of this Exhibit A-9 is that it be admitted. It is admitted for the limited purpose stated by Counsel, namely, to show the pier number and the city street identification.

Mr. Morrow: Yes, your Honor. I really believe that Counsel and the Court will find it of great convenience. [285]

The Clerk: Respondent's A-10.

(U. S. Coast and Geodetic Survey sounding chart was marked Respondent's Exhibit No. A-10 for identification.)

Mr. Morrow: A-10, your Honor, was a subject of the pretrial order listed under libelant's exhibits, Exhibit L-2, has now been marked Respondent's Exhibit A-10, is offered in evidence.

The Court: Can you give it a name that does reflect the character of the information contained in the exhibit.

Mr. Morrow: Yes. It is a sounding chart prepared by the United States, I believe, Coast and Geodetic Survey Service and contains in minute details the soundings and particularly the soundings and depth of water in the area in the vicinity of Piers 57 and 64 inclusive.

The Court: It has a certificate attached to it

(Testimony of John H. Bowen.)

bearing the seal of the office of the Secretary of the Department of Commerce of the United States. I wish Counsel to take the exhibit and look at the information reflected by it and the nature of it and the location of the objects dealt with by the material or by the information on the exhibit, beginning at the upper left-hand corner of the exhibit and extending [286] clear across the face of the exhibit to the right-hand limit of the statement of the information sought to be reflected on the exhibit.

Mr. Morrow: Yes, your Honor, and for the purpose of the record and further identification, this is an exhibit which is certified as being a copy of the original Hydrographic Survey H-5864 made in 1935 including additional work done in 1936 on file in the U. S. Coast and Geodetic Survey, and——

The Court: Is it true that that statement means that it is a water depth chart of the waters which are involved from Smith Cove on the north to some point on the south?

Mr. Morrow: To East Waterway, yes, your Honor, covering the water from Smith Cove to East Waterway in Elliott Bay, Washington.

The Court: Would that be a Coast and Geodetic Survey record? Is it or is it not a Coast and Geodetic Survey record?

Mr. Morrow: Yes.

Mr. Mikkelsen: It is, your Honor.

The Court: I have marked it a 1935-'36 Coast and Geodetic Survey water depth chart.

(Testimony of John H. Bowen.)

Mr. Morrow: Yes, and the exhibit is offered in evidence. [287]

The Court: Any objection?

Mr. Mikkelborg: The libelant has no question whatever regarding the authenticity of the document but questions its materiality and relevancy at this time in view of other similar records of water depths which are already in evidence.

The Court: May I ask offering Counsel, for what purpose not already served by other exhibits do you offer this one?

Mr. Morrow: Yes, your Honor. This is a situation where the cartographer for the United States who has been on the stand here used this particular exhibit in the preparation of a depth of water curve and is a basic document which will support his testimony offered on behalf of the respondent and in connection with his establishment of an 180 foot depth of water in the area and vicinity of the Seattle-Fort Lawton cable involved in this case.

The Court: That would indicate to me offhand the propriety of this question: Is there any dispute about how deep the water was here?

Mr. Morrow: There is no dispute about how deep the water was but it is important to the respondent's case to show the curve of the 180 foot mark as related to the depth of the cable in the water and the depth of [288] the anchor from the surface of the water.

(Testimony of John H. Bowen.)

The Court: Do you say that this chart bears upon that subject?

Mr. Morrow: Yes, your Honor.

The Court: Do you deny it?

Mr. Mikkeltorg: There is evidence already in concerning the depth of water and the depth of the anchor.

The Court: That may be, but do you deny that this chart bears on that subject?

Mr. Mikkeltorg: I understand that it bears on the depth of the water and the depth of the water out by the anchor chain of the Princess Louise. It is cumulative.

The Court: It forms the basis of a curve outlining the depth of water in this area, is that right?

Mr. Mikkeltorg: Yes, your Honor.

The Court: The objection is overruled. Respondent's Exhibit A-10 is now admitted.

(Respondent's Exhibit No. A-10 for identification was admitted in evidence.)

Mr. Morrow: At this time I would like to have marked a Coast and Geodetic Chart No. 6449.

The Court: Is this a third or only the second—

Mr. Morrow: This is one from the Princess Louise, your Honor.

The Court: Is this the third or the second of [289] that numbered chart, or is it the first one?

Mr. Morrow: This is the second.

The Court: Why do you wish to offer this?

Mr. Morrow: This, your Honor, is an agreed

(Testimony of John H. Bowen.)

exhibit which has been marked by Captain Campbell of the Princess Louise showing his maneuvers.

The Court: When did he do it?

Mr. Morrow: Well, he did it prior to the trial and it has been——

The Court: And after the accident?

Mr. Morrow: Yes, your Honor. It will be illustrative, offered only as illustrative of his testimony rather than have him mark the chart on the stand.

The Court: I assume you are going to call him as a witness as expressly indicated by your not cross examining him when he was on the stand previously.

Mr. Morrow: No, your Honor, Captain Campbell is the captain of the Princess Louise.

The Court: Was not that captain on the stand?

Mr. Morrow: Yes, he was, your Honor. You're quite right.

Mr. Mikkelborg: This is not, as I understand it—this exhibit has been previously marked by a witness, it is not one that has been agreed to in the pretrial. [290]

Mr. Morrow: No, this is the exhibit which I showed——

The Court: The court will have to wait and see if it is admissible.

The Clerk: Shall I mark it, your Honor?

The Court: Do you not think it would be better to wait until that witness is on the stand?

Mr. Morrow: All right. May we have it marked then?

(Testimony of John H. Bowen.)

The Court: In the meantime offering Counsel will exhibit it to opposing Counsel to give him an opportunity of familiarizing himself with it. I do not wish to interrupt your proceedings now, but if libelant's Counsel feels that he may properly give that sort of attention to it now while you are proceeding with the other exhibits, you may do so. I mean proceeding with other matters.

Mr. Morrow: Yes, your Honor.

(Mr. Mikkelborg examining chart referred to.)

The Court: In view of the fact that it all may be so quickly obviated when and if that witness takes the stand I do not wish to pause longer.

Mr. Morrow: Yes. May we just have it marked at this time then, your Honor, and I will—— [291]

The Court: I think it would be more logical and in better sequence if you let that await the witness' taking the stand.

Mr. Morrow: Very well. Now I would like to reoffer in evidence at this time Respondent's Exhibit A-2, being a Coast and Geodetic chart marked by William M. Martin, a United States cartographer, showing a curve of 180 foot depth marked.

The Court: Is there any objection to the offer?

Mr. Mikkelborg: There is no objection to the authenticity. I again——

The Court: Is that a third or just a second——

Mr. Mikkelborg: This is the third of that number.

(Testimony of John H. Bowen.)

The Court: Of Coast and Geodetic Survey Chart No. 6449.

Mr. Mikkellborg: It is my understanding of the state of the record that that is the third one of this particular number.

The Court: It is the third one referred to. I do not know whether there have been two before this marked or not.

Mr. Morrow: This was the second one that has been previously marked as Respondent's Exhibit A-2.

The Court: I am not—— [292]

Mr. Morrow: This exhibit, your Honor, is one which was prepared at the request——

The Court: It is another Coast and Geodetic Survey Chart 6449 and I assume it is the second one. It has "A-2" on it.

Mr. Morrow: Yes, your Honor.

The Court: Why is it necessary for another identical 6449 numbered chart to be offered in evidence?

Mr. Morrow: For this reason, your Honor, that to mark the other chart with a curve the witness can do it when he gets on the stand, of course, but I feel that it will interfere with other markings on the other chart, and——

The Court: Then we will see further about it. The Court will not admit it now.

Mr. Morrow: Very well. I am ready to proceed, your Honor.

The Court: You may proceed.

(Testimony of John H. Bowen.)

Mr. Morrow: Would you hand the witness, Captain Bowen, the February 5, 1953 cable report of the ship Basil O Lenoir, it having been previously admitted in evidence and marked Exhibit A-5.

(The exhibit was handed to the witness.)

The Court: That is denominated the cable report of February, 1953, concerning cable damage. You may [293] proceed. The witness has the exhibit now and Counsel may proceed.

Mr. Morrow: I'm a little lost, your Honor. I don't know whether the permit of the 1949 installation has been offered or admitted in evidence. If not, I would like to have a copy marked.

Mr. Mikkelsen: If the Court please, I believe that is Libellant's 5.

Mr. Morrow: Yes.

The Court: It has been admitted.

Mr. Morrow: Yes, Libellant's 5.

The Court: Mark it as admitted so it may be clearly shown.

Mr. Morrow: And also Respondent's A-1 before the witness.

The Court: A-1 has been admitted and you may show it to the witness.

(Respondent's Exhibit A-1 was handed to the witness.)

The Court: Do you wish the permit be shown the witness?

Mr. Morrow: Yes, I think he should have all those documents.

The Court: A-5 is shown to him.

Mr. Morrow: Yes, your Honor. [294]

(Testimony of John H. Bowen.)

Direct Examination

Q. (By Mr. Morrow): Captain Bowen, referring you to Libellant's Exhibit 5, would you state briefly what that exhibit is?

A. It's identified by its heading as a War Department permit for federal agencies.

Q. Does that document indicate the proposed bearing of the Seattle-Fort Lawton cable in 1949?

A. Yes, sir.

Q. What is that bearing?

A. 282 degrees 49 minutes true.

Q. Where does it extend from?

A. From the southwestern tip of Pier 57.

Q. And Pier 57 is at the foot of what street in the City of Seattle?

A. I'm not familiar with the streets in the City of Seattle.

Q. Have you, Captain Bowen, at my request and in the presence of the United States attorney marked on Respondent's Exhibit A-1 the bearing of the proposed cable? A. May I look at A-1?

The Court: Yes.

A. I don't recall which of those charts it was marked on.

The Court: Look for the clerk's identifying mark.

A. I see it, sir, yes, A-1. Yes, I have. [295]

Q. (By Mr. Morrow): And how is that particular marking of the proposed cable identified on Respondent's Exhibit A-1?

(Testimony of John H. Bowen.)

A. It's a pencilled line identified by the numerals, or by the bearing in numerals 282 degrees 49 minutes.

Q. Now, you have testified that you participated in the laying of the cable in 1949. My question is, was the cable laid in accordance with the United States permit, Libelant's Exhibit 5?

A. To the best of my recollection, yes.

The Court: What is the number of those degrees that you mentioned, 282——

A. 282 degrees 49, or 48——

The Court: You may proceed.

Q. (By Mr. Morrow): Is the cable as laid out on the chart, Respondent's Exhibit A-1, within the marked cable area on the chart? A. Yes, sir.

Mr. Morrow: Would the Court at this time like to look at that particular marking?

The Court: I would rather you go right ahead.

Mr. Morrow: Very well.

A. (By Mr. Morrow): Captain Bowen, you have before you the 1953 cable report of the ship Lenoir marked Exhibit A-5. A. Yes. [296]

Q. Does that exhibit show the coordinates of the cable Seattle to Fort Lawton and the splices as the cable was relocated in 1953 following the casualty?

A. Yes, sir.

The Court: The word "co," "co" something?

Mr. Morrow: Coordinates, coordinates.

The Court: You may proceed.

Q. (By Mr. Morrow): Is that information to be found on the last page of the exhibit?

(Testimony of John H. Bowen.)

A. Yes.

Q. Are the coordinates laid out in terms of latitude and longitude? A. Yes.

Q. Does the last page of the exhibit show the location of the cable as it existed following repairs in 1953? A. Yes.

Q. Between the periods of repair of the cable in 1953 and up to March 20, 1955, was there any relocation of the cable?

A. Not to my knowledge.

Q. When you performed the repairs in March, 1955 the information you used concerning the whereabouts of the Seattle-Fort Lawton cable was contained, was it not, on your cable report, Respondent's Exhibit A-5? A. Yes. [297]

Q. To the best of your knowledge prior to damage to the cable in March, 1955 the Fort Lawton-Seattle cable laid just as illustrated on the last page of Respondent's Exhibit A-5, is that not correct?

A. Yes, to the best of my knowledge.

Q. Captain Bowen, at my request and in the presence of the United States Attorneys did you transpose the information as to the position of the 1953, or the 1953 position of the Seattle-Fort Lawton cable from Exhibit A-5 and the last page thereof to the Chart 6449 marked as Respondent's Exhibit A-1? A. Yes, sir.

Q. Now, how is the 1953 location of the Seattle-Fort Lawton cable identified on Respondent's Exhibit A-1? A. By a red line.

(Testimony of John H. Bowen.)

Q. Is it likewise indicated by tiny circles representing four different circles and four different lines? A. Yes.

The Court: What is the numerical number, if you know, of the Canadian Pacific Dock in Seattle?

A. Pier 64, sir.

Q. (By Mr. Morrow): Now, are the red lines and the little circles on Respondent's Exhibit A-1 the location to the best of your knowledge of the Seattle-Fort Lawton cable as it existed just prior to the March, 1955 damage? [298] A. Yes.

Q. Now, Captain, does the mark, the location of the cable, as indicated on Respondent's Exhibit A-1 by red lines and red circles show that the cable extended outside the marked cable area on the chart?

A. It extends beyond the cable area marked on the chart?

Q. Yes.

A. As far as the cable area extends, it's inside the cable area.

Q. Do the red markings of the cable as it existed prior to March, 1955 indicate a northerly turn or bend of the cable across the face of Pier 64?

A. Yes.

Q. Captain Bowen, I would like to have you refer to your cable report of the ship Lenoir for 1955, being Exhibit A-4.

Mr. Morrow: Will you pass that to the witness, please, and the log of the Lenoir, being A-3.

(The exhibits were handed to the witness.)

(Testimony of John H. Bowen.)

Q. Do those two documents show the coordinate or the position in terms of latitude and longitude of the place where the ship Lenoir picked up the broken end of the cable extending from the Seattle shore?

A. No. The ship did not pick up the broken end.

Q. Yesterday in your testimony, Captain Bowen, if I recall [299] correctly, you stated that on the 26th of March at the hour of 0847 the broken end of the cable was brought over the bow of the ship Lenoir and that that was the position of the break from the Seattle end. Is that substantially correct?

A. Yes, sir.

Q. Now, what is the position of the broken end in terms of latitude and longitude as shown by your cable chart and by your log, or by either?

A. We're referring now to the end of the cable on the Seattle side of the break?

Q. That's right.

A. Yes. The position there given in coordinates, you want that read, sir?

Q. Yes.

A. Latitude 47 degrees 36 minutes 29 seconds north, longitude 12 degrees 21 minutes 8 seconds west.

The Court: I would like you to repeat all of that very slowly and give the name and spell that name, the class name of those figures and readings.

A. Latitude?

The Court: No. You used the word "coordinates" and so did Counsel, is that right?

(Testimony of John H. Bowen.)

A. Yes.

The Court: Will you spell that word, please?

A. C-o-o-r-d-i-n-a-t-e-s.

The Court: What does it mean to you?

A. To me it indicates the longitude and latitude given in degrees, minutes and seconds, and labeled as the case may be north, west, east or south.

The Court: Now will you repeat those readings?

A. Latitude 47 degrees 36 minutes 29 seconds north.

The Court: You may proceed.

A. Longitude 122 degrees 21 minutes 08 seconds west.

The Court: Is that all?

A. Yes, sir.

The Court: Proceed.

Q. (By Mr. Morrow): Captain Bowen, at my request and in the presence of the United States attorneys did you plot that position on Respondent's Exhibit A-1? A. Yes, sir.

Q. How is that position indicated on Respondent's Exhibit A-1?

A. By a small blue circle designated by a blue spear and the label "Seattle broken end."

Q. Now,—

The Court: Read the last question and answer, please. [301]

(The reporter read the last question and answer.)

Q. (By Mr. Morrow): Captain, is the position in which you picked up this broken end within the

(Testimony of John H. Bowen.)

marked cable area on the chart, Respondent's Exhibit A-1?

A. No, it's beyond the western extremities of that.

Q. By "beyond" you mean it's outside the marked cable area? A. Yes.

The Court: You now speak of the location of the broken end of the cable picked up by your vessel, is that right?

A. Yes, sir.

Q. (By Mr. Morrow): Is the position of the broken end, Captain Bowen, approximately off the face of Pier 64?

The Court: Is that the CPR dock?

Mr. Morrow: Or the CPR dock.

A. No.

Q. (By Mr. Morrow): Well, generally speaking it is opposite Pier 64, isn't it?

A. It's considerably south of Pier 64.

Mr. Morrow: I will let the Court——

The Court: Is it south of—what did you——

Mr. Morrow: I would like the Court to look at it.

The Court: I will. [302]

(Respondent's Exhibit A-1 was handed to the Court.)

The Court: I have looked at many charts and I do not think I ever saw one where the directions were as poorly and indistinctly pointed out as they are on this chart. I have looked at it. Do you wish the chart returned to the witness?

(Testimony of John H. Bowen.)

Mr. Morrow: Yes, your Honor.

The Court: I wish you would look at the bottom of the chart determined by the proper positioning of the printing that appears on the sheet of paper in regard to the printing and the number of the chart is the bottom end, and I wish you would advise the Court what you understand, both Counsel, are the directions indicated on this chart. Is the up and down direction substantially one cardinal direction as compared with another or is it or is it not so, and if it is not so, in what direction do the cardinal directions run as indicated on that map?

Mr. Morrow: Yes, your Honor.

The Court: Turn the map around, Mr. Clerk, so that Counsel can see the bottom of it.

Mr. Morrow: Yes, your Honor. The——

The Court: Mark on the margin of that map which is north and put an arrow pointing to which is north on the map and mark on it which is south, and so [303] forth. The chart does not give any information that is not noticed by anyone who does not read a chart every day.

Mr. Morrow: Very well. That has been done, your Honor.

The Court: Very well. In other words, the bottom and top are about an accurate position of north and south, is that right?

Mr. Morrow: Yes.

The Court: If you draw a line in the middle of the chart from the top end of the piece of paper on which the chart is stamped to the middle of the

(Testimony of John H. Bowen.)

bottom of it you would go in a southerly direction all the way, is that right?

Mr. Mikkelborg: That's correct, your Honor.

The Court: Proceed.

(Respondent's Exhibit A-1 was handed to the witness.)

Q. (By Mr. Morrow): Captain, referring you to the chart, the position marking the broken end is approximately perpendicular, is it not, to the Bell Street Terminal? Would you like a pair of—

A. I have a protractor here. Yes, it's approximately perpendicular to the face of the Bell Street Terminal.

The Court: Is the position of that broken end cable approximately westward from the face of the dock? [304]

A. No, sir.

The Court: Which direction is it?

A. It would be southwest, your Honor, of the face of the Bell Street Terminal.

The Court: You may proceed.

Q. (By Mr. Morrow): But it is nonetheless perpendicular to the Bell Street Terminal, is it not?

The Court: You mean west of the face?

Mr. Morrow: Yes.

A. Not to the west, sir. Perpendicular.

Q. (By Mr. Morrow): From the face of the terminal?

A. Yes. The face of the terminal runs in a northwest-southeast direction.

(Testimony of John H. Bowen.)

Q. I understand. Now, Captain Bowen, what is the pier number of the Bell Street Terminal?

A. Pier 66, I believe.

The Court: Is it true that it is about three piers from the CPR pier which has been named as what number?

A. Pier 64.

The Court: How many piers away from Pier 64, the CPR dock, is this Bell Street dock?

A. It indicates that it's the next dock.

The Court: But it does not bear the next consecutive number, either less or more than the number [305] of the Canadian Pacific Dock, is that true or not?

A. I'm not positive about the number of the Bell Street Terminal, your Honor.

The Court: You may proceed.

Q. (By Mr. Morrow): Captain Bowen, how far is this broken position that you have marked on Respondent's Exhibit A-1 from the closest marked cable area on the chart?

A. Approximately 450 yards from the western extremity.

Q. And how much is that in terms of feet?

(Witness computing.)

A. 1,350 feet.

Q. Thank you. Captain Bowen, did the cable ship establish a position at which it grappled and picked up the cable extending from Fort Lawton to Seattle?

A. Yes.

Q. Would you refer to your log book, Exhibit

(Testimony of John H. Bowen.)

A-3, to the date of March 26th at the time 0929 and read the entries therein?

A. Following the entry 0929 on the date of March 26th the entry reads, "Telephone cable on deck."

Q. Have you finished?

A. No, sir. "Latitude 47 degrees 36 minutes 35 seconds."

The Court: Please repeat that. I am anxious to get that.

A. Yes, sir. [306]

The Court: The date is when?

A. 26 March. The hour is 0929.

The Court: What year?

A. 1955, your Honor.

The Court: You say the entry is "Cable on deck," is that what you said?

A. Yes, sir, "Telephone cable on deck."

The Court: Then what else?

A. "Latitude 47 degrees 36 minutes 35 seconds, longitude 122 degrees 21 minutes 19 seconds west."

The Court: What was that first one, the latitude? Which direction was that? Does it say anything about north or south?

A. The entry is not made in the log, your Honor.

The Court: Proceed.

Q. (By Mr. Morrow): Do you have a fathometer reading with respect to that entry?

A. Yes, sir.

(Testimony of John H. Bowen.)

Q. What is that?

A. The recorded entry is "Depth, 36 fathom."

The Court: Is that of the water or something else?

A. That's of the water, your Honor.

The Court: You may proceed. [307]

Mr. Morrow: Your Honor, this is one position which the United States Attorneys objected to putting on this chart in the absence of the——

The Court: Now what is it you wish him to do?

Mr. Morrow: I would like to have him fix that position on the chart.

The Court: What he has just stated in latitude and longitude?

Mr. Morrow: Yes, your Honor.

The Court: What is your attitude about his doing that on an exhibit already in evidence?

Mr. Mikkelborg: He may certainly do so.

The Court: The Court would prefer that he use the one already in evidence.

Mr. Morrow: Yes, on this chart he has right there before him.

The Court: He may do that right now.

The Witness: Plot this position, sir?

The Court: Will you state the question or direction to the witness which you wish him to respond to, Mr. Morrow.

Mr. Morrow: Yes.

Q. (By Mr. Morrow): Captain Bowen, will you place the position which you have just indicated, being the latitude 47 degrees 36 minutes 35 seconds

(Testimony of John H. Bowen.)

north, longitude 122 [308] degrees 21 minutes 19 seconds west, on chart Respondent's Exhibit A-1?

The Court: He may do that. In the meantime do both Counsel agree that the latitude is meant to be a north latitude statement?

Mr. Mikkeltorg: Yes, your Honor.

Mr. Morrow: Yes, your Honor.

The Court: The witness indicates he has finished doing what he has been requested to do.

Mr. Morrow: Yes. May I see it?

The Court: You may see that, both Counsel may.

The Witness: It's the point circled in pencil.

Mr. Morrow: I'll have him further identify it, your Honor.

Q. (By Mr. Morrow): Captain Bowen, would you extend a pencil line northerly from the black circle and position which you have just indicated and at the end of the pencil line put the following, if agreeable with Counsel: "Picked up cable extending from Fort Lawton."

Mr. Morrow: Is that agreeable, Counsel?

Mr. Mikkeltorg: Yes.

The Court: He may do that, and after he has done that will you pause for a minute.

(Witness writing on Respondent's Exhibit A-1.) [309]

The Court: I do not see any reason why he could not do this during the recess. Court is at recess for about ten minutes. I wish the witness to have a recess period after he has finished the accomplishment of the last request. Court is now at recess.

(Testimony of John H. Bowen.)

(Short recess.)

The Court: You may proceed. All are present.

Q. (By Mr. Morrow): Captain Bowen, can you state the distance between the position on the chart at which the cable was picked up, that's the cable end extending toward Fort Lawton, and between the position establishing the broken end from the Seattle end, from the Seattle end, from the Seattle side? A. Yes.

Q. What is that distance between those two positions? A. It appears to be 320 yards.

Q. Captain, by examination of your cable report for 1955 and your log can you state the length of the cable that was picked up by the ship Lenoir from the Seattle side?

A. I don't quite understand you, sir. Would you repeat——

The Court: Would you repeat the same words or would you rather explain it?

Mr. Morrow: Yes, I would rather——

The Court: Do you wish this question withdrawn?

Mr. Morrow: Yes, this question is withdrawn.

The Court: That will be done.

Q. (By Mr. Morrow): Captain, I call attention to your — I believe it was your testimony, that in picking up the cable from the Seattle side you cut it off at the sea wall, put it on a drum and then proceeded to the position of the broken end, and the drum contains a rotometer which measures the length of the cable. Do you understand what I'm

(Testimony of John H. Bowen.)

talking about? A. Yes, sir.

Q. What I have said is a fact, is it not?

A. Not exactly, sir.

Q. Well, would you explain it, then?

A. It's picked up over a drum and passed back into a circular hold where it's coiled by hand. It is not contained on the drum.

Q. But there is a device that measures it?

A. Yes, sir.

The Court: Measures it?

Mr. Morrow: Yes.

The Court: The length of it?

A. Yes, sir.

Q. (By Mr. Morrow): Now, do you recall that the measurement of the cable was 3,450 feet as determined by your calculations?

A. I think that's approximately right. [311]

The Court: Do you mean the part of the cable that was broken off from the main length of cable from its original termini?

Mr. Morrow: Yes, your Honor, the distance from the Seattle side at the sea wall to the broken end was, according to the witness, 3,450 feet.

The Court: Is that what you intended to say?

A. Yes.

The Court: What I would like to know is, Captain, what have you to say as to the possibility that the broken end of the cable which you put aboard your vessel on that occasion may at the moment when you found it to be broken have been withdrawn some distance and, if so, how much distance

(Testimony of John H. Bowen.)

from the place where it was when it parted, if it did part?

A. It did part, your Honor, and it could possibly have been pulled from that position a short distance. The ship is——

The Court: By your vessel's process of taking it aboard your vessel?

A. Yes, sir.

The Court: Continue your discussion, will you please, of that possibility and how much distance it may have been displaced, if it may have been, by the operation of taking the broken piece on board?

A. Yes, sir. We backed clear of the pier with the ship's engines picking up the cable the while and turned with the vessel, put it on approximately the course on which the cable had been laid, continuing to pick the cable up into the vessel, and as the ship continued with way the engines were stopped and the cable was picked up, pulled into the vessel. As the end came aboard the ship——

The Court: That is the broken end?

A. As the broken end came aboard the ship the mate at that time took visual bearings to plot the ship's position and recorded them in the log. The cable could possibly have been pulled a short distance, dragged on the bottom a short distance toward the bow of the ship, and I don't know exactly the interval between the time that end appeared on the foredeck until the time the mate had his bearings taken when the ship still might have had head-

(Testimony of John H. Bowen.)

way and carried on beyond the end where it had rested on the bottom.

The Court: Is it or is it not possible that in those activities the position of the broken end that came aboard when it came aboard your vessel could have been a great distance from the place where that broken end was at the moment it was broken?

A. I don't think it could have been a great [313] distance, your Honor, no.

The Court: How many feet could it have been away from the place where it was at the moment it was broken?

A. I would say not more—in that depth of water not more than 150 feet.

The Court: How can you be assured that in shipping on board from the bottom of the Sound or Elliott Bay a cable of that size and weight, loose at both ends as it became when you cut the short end of the piece that had already been broken at that distance where you stated the break occurred, how can you be assured that the mere handling of that relatively small length of that heavy cable would not displace either end of it a considerable distance in feet or yards?

A. The cable as we started to pick up, sir, was about a half a mile, which would have been roughly five tons of cable. We exerted very little strain as we were picking it up very slowly, and at that moment we also gave the ship a little push ahead, as it were, with the engines, to exert as small a strain as possible on the cable. So the ship at that time

(Testimony of John H. Bowen.)

had way and it was following the course of the cable, the cable was coming in over the bow of the vessel and it would have taken only a very short time in that shallow water to bring the [314] end up from the bottom to the surface, so it would be my opinion that it would be relatively close to the position where the broken end was left.

The Court: State if you know before the cable was broken there was enough slack in it as it lay on the bottom to permit that cable to be moved sideways or in a direction away from its bed where it laid before it was disturbed. Is it possible that as it laid there before the break to have sufficient slack to permit a dragging anchor to pull it a matter of considerable distance in feet or yards away from its bed before the disturbance?

A. Yes, sir, there would have been sufficient slack to move it.

The Court: Have you anything to say about what would have been the maximum or minimum? What have you to comment, if any comment you feel it is proper for you to make——

A. I will say this—excuse me.

The Court: ——from the facts as you learned them, about the distance of the move that may have been effected upon the position of the cable before it broke by the dragging anchor or by a dragging anchor? Comment upon that, Captain, if you have sufficient information on the subject to do so. [315]

A. The cable could have been moved without

(Testimony of John H. Bowen.)

breaking it I would say as much as 600 feet, possibly more. It's been my experience——

The Court: Is that away from the bed?

A. From its initial position, yes, sir.

The Court: At the moment before a dragging instrument may have started a disturbance of its position?

A. Yes, sir.

The Court: You may continue.

Q. (By Mr. Morrow): On that same point, Captain Bowen, can you tell the Court in reference to the position as plotted for the broken end at the Seattle end and the 1953 position as established whether there is any indication, and if so what indication there is, that the cable was pulled out of line?

A. The position at which the Seattle end was picked up is south of the position the cable was replaced in 1953 a distance of approximately 75 yards.

Q. Could that cable have been disturbed in a southerly position in your opinion by a ship backing with his anchor out?

A. If the anchor were dragging on the bottom, yes.

Q. Now, Captain, what is the direct distance between the Seattle side at the sea wall at Pier 57 and the position of the broken end as marked on the chart? [316]

A. 1,100 yards.

Q. Pardon me?

A. 1,100 yards.

(Testimony of John H. Bowen.)

Q. 1,100 yards? A. Yes, sir.

Q. That would be 3,300 feet? A. Yes.

Q. And how does the 3,300 feet compare to the 3,450 feet of cable you picked up? 150 feet difference, is that correct? A. Yes.

Q. So with that information, Captain, it appears, does it not, that the cable, if it was disturbed at all from its 1953 position, was pulled southerly approximately 75 yards as a first conclusion, is that correct?

A. From that information it appears that——

Q. Yes. A. No.

Q. You have already testified——

A. You were talking about the length of the cable picked up as against the distance spanned.

Q. Pardon me?

A. I say you were speaking of the length of the cable picked up as against the distance spanned.

Q. Well, I'll withdraw the question. You have indicated [317] that there was a possible disturbance of the cable at the point establishing the break 75 yards, was it, southerly, is that correct?

A. I think so.

Q. Now, you have also indicated that the distance from the sea wall where the cable starts out and where you cut it off to the position of the break was 3,300 feet, is that correct? A. Yes.

The Court: Read that last question and answer.

(The reporter read the last question and answer.)

(Testimony of John H. Bowen.)

The Court: Where you cut it off to the break, what do you mean?

Mr. Morrow: The distance from the sea wall outward to the position of the break as established by the ship the captain says——

The Court: That is sufficient. Proceed.

Q. (By Mr. Morrow): Now, the difference between the amount of cable you picked up on that occasion and the actual distance is only 150 feet, is it not? A. Yes.

Q. So that there is an unlikelihood that the ship Lenoir in picking up the cable pulled the cable in very much, isn't that correct? [318]

A. I would say that's correct.

Q. If at all. Now, Captain, you laid this cable originally in '49. Is it true that the cable is embedded in the mud?

A. I wouldn't say to any great distance, to great depth, no.

Q. Not to any great depth, but it is embedded in mud. That is a muddy bottom there, is it not?

A. As I recall we found growth on that cable which would indicate that it was resting on the surface.

Q. On the surface of what, the bottom?

A. Of the bottom, yes.

Q. Was the cable entrenched in any way to protect it against the fouling of an anchor?

A. No.

The Court: How could it be from the standpoint

(Testimony of John H. Bowen.)

of practical laying of submarine cables, how could it be entrenched?

A. I know of no way, your Honor.

The Court: Do you know of any submarine cable that is not just dropped on the bottom?

A. There are a few rare cases where a plow is used. On the Grand Banks the fishermen have trouble with it. It's a very expensive operation and it's not generally done. That's the only place in the world where I know it's done. [319]

The Court: How could you cover up the cable after you dig a trench to put it in?

A. It's a very fiendish device, sir, that bores a hole in the ground.

The Court: Then in turn the ground is placed on top of that?

A. I think so, your Honor. I've never seen it.

The Court: It is not very helpful in this case, but it is very interesting. You may proceed.

Q. (By Mr. Morrow): After the cable was laid in 1953 and shortly prior to the 1955 casualty, Captain Bowen, it would interfere, would it not, with the navigation of vessels insofar as dropping of their anchors was concerned off the face of the Canadian Pacific Dock and the Bell Street Terminal?

A. I don't know. It would depend on what depth they dropped their anchors to.

Q. Well, at two fathoms. A. Sir?

Q. At two fathoms. A. At two fathoms?

Q. Yes. A. Depth?

(Testimony of John H. Bowen.)

Q. Yes. Or 30 fathoms, pardon me. [320]

A. No.

Q. I misspoke myself. You say no?

A. I don't think so.

Q. Are you familiar with the 180 foot depth curve that runs along the face of the Canadian Pacific Dock and the Bell Street Terminal?

A. No.

Q. You're not familiar with it? A. No.

Q. I see.

Mr. Morrow: That's all.

Cross Examination

Q. (By Mr. Mikkelborg): Captain Bowen, does the record which you have testified to I believe as Respondent's Exhibit A-5 entitled a deck cable report or your log show—that is the record of the cable laid after the 1953 repair and prior to March of 1955. Does that record show the cable within the boundaries of the cable area marked on the Coast and Geodetic Survey chart which has been marked here as Respondent's A-1? A. Yes.

Q. With respect to the broken end, that is the Seattle end which you picked up and have related the position of the [321] ship at the approximate time the end came aboard, what was the depth of water at that position?

A. The log indicates the depth of water at that position at 30 fathoms.

Q. Now, in your experience, Captain, in the repair of cables and the laying of cables does the

(Testimony of John H. Bowen.)

position in which the broken end was logged aboard have any direct and necessary relation to the position in which the cable was hooked or contacted by any dragging object?

A. I would say yes, it's the closest measurement to that position we could obtain.

Q. I didn't make my question clear, Captain. Is there any relationship between the position at which a broken end is found and the position in which the cable might have been first contacted by the device or the thing that caused it to break? If you don't understand my question——

A. I think I follow you, Mr. Mikkelborg. There is some relation. It could have been dragged a considerable distance before it broke and possibly hung onto the device that broke it and been dragged an additional distance after it was broken.

Q. Captain, in connection with this cable, what is the tensile strength, if you know, of this particular cable laid between Fort Lawton and Seattle?

A. It's approximately 25 tons. [322]

The Court: In other words, it would take a weight of 25 tons with all of its mass being suspended by the cable to break the cable, is that right?

A. Yes, sir.

Q. (By Mr. Mikkelborg): Is it correct to say it would withstand a pulling strain against it of up to approximately 25 tons before it would part? Is that correct?

A. Yes, that's correct.

Q. Now, Captain, you testified with respect to

(Testimony of John H. Bowen.)

a position in 36 fathoms of water at position 47 degrees 36 minutes 29 seconds north and longitude—north latitude that is, and north longitude 122 degrees 21 minutes 8 seconds west. Was that the position of the broken end, that is the Fort Lawton end of the cable, or was that the position in which you raised that segment of the cable somewhere along its length and not the position of the broken end?

A. It was the position at which we raised the bight of the cable somewhere along its length and not the position of the broken end.

Q. Now, Captain, you testified that the length of cable from the sea wall at Pier 57, that is its shore terminus, out to the broken end, that is the Seattle broken end, was some 3,450 feet, and you testified that the direct distance or the visual distance along the surface from [323] that same terminal point at Pier 57 out to the position in which the broken end, the Seattle end, was logged aboard was some 3,300 feet, is that correct? A. Yes.

Q. With a 150 foot difference? A. Yes.

Q. Are you familiar with the gradient of the bottom of the bay as it goes from Pier 57 at the sea wall out to that position in which you picked up the broken end?

A. It slopes off, it becomes deeper.

Q. It slopes off from approximately how deep at the sea wall to what depth at the position of the broken end?

A. The depth at the sea wall I think would be

(Testimony of John H. Bowen.)

about two to three fathoms. At the broken end my log indicates 30 fathoms.

Q. Now, at the time the broken end came aboard over the spool, I think you have described it, or the reel on the bow of the Lenoir, speaking of the broken end of the Seattle segment, did the ship have way on it?

A. Yes, it would have had way on it.

Q. In what direction was that way carrying the ship at the time the broken end came aboard?

A. Along the course that the cable was at that time on the bottom, in a northwesterly direction.

Q. In a northwesterly direction. Now, how far up from the [324] bottom did the end of that cable have to travel before it came aboard?

A. 30 fathoms, or 180 feet.

Q. And is it correct that the ship had way on it at this time? A. Yes.

The Court: What is your final comment, then, or will you finally comment upon your estimate of the reasonable amount of distance that cable may have been moved by every force that was brought to bear upon it from the time it was fouled, if the Court should find on the evidence that it was fouled, by a dragging anchor until it got on board your vessel?

A. The distance from which it may have been disturbed from the time it was initially fouled by an anchor and then broken by that anchor could have been possibly 600 feet. The distance the ship might have moved it would have been in my judg-

(Testimony of John H. Bowen.)

ment about 150 feet. Those added together would make a total of 750 feet, your Honor.

Q. (By Mr. Mikkelborg): Captain, is it not true——

Mr. Morrow: Objected to as leading.

Mr. Mikkelborg: This is cross examination, Counsel.

Mr. Morrow: I'm going to object then on the [325] basis that this is not within the scope of the direct.

Mr. Mikkelborg: If the Court please, this is precisely within the scope of the direct.

The Court: The objection is overruled.

Mr. Morrow: I object to it as leading, your Honor.

The Court: That objection is overruled.

Q. (By Mr. Mikkelborg): During the time that the broken end had to travel from 30 fathoms down until it came over the bow of the Lenoir, you testified the Lenoir had some way on her in a north-westerly direction, is that true? A. Yes.

Q. Isn't it also true then, Captain, that the broken end of the cable, the Seattle end, would have been some distance, some perceptible distance to the southeast of the position logged for the time the cable end came aboard? In other words, south-east or further inshore?

A. That is possible. The ship would have been moving at the same rate the cable was picking up, therefore it would follow that the ship would move approximately the same distance on the surface as

(Testimony of John H. Bowen.)

the cable had to rise from the bottom, the ship's speed having been determined prior to that by dragging itself along with the cable.

Q. So is it your testimony then that at least the broken end would have been a distance of some 180 feet further [326] inshore from the southeast than the position at which you raised the end aboard, brought the end on deck?

A. I'd say that was possible, yes.

Q. Is that not probable, Captain, under all the circumstances?

A. It could be reduced a bit below that 180 feet because the ship at the same time would be losing way, and that was the reason for my giving the estimate of 150 feet for the possible distance that the ship may have moved the cable.

Q. How heavy is the Lenoir?

A. Her displacement would run with the load I think she had at that time something over 1,300 tons.

Q. She's 1,300 tons? A. Yes.

Q. Captain, you in your experience have grappled and raised a good many cables, I believe you stated, and correct me if I'm wrong, during your experience you have participated in some 180 cable operations, is that correct? A. Yes, sir.

Q. What type of instrument is a grapnel? Would you describe it?

A. It's roughly a hook designed for fishing for cables on the bottom.

(Testimony of John H. Bowen.)

Q. Does it have hooks or flukes something like an anchor. [327] A. Yes.

Q. If such a grapnel or anchor were dragged somewhat lengthwise to a cable as the cable goes out into deeper water and the length of the grapnel remained the same, isn't it true that it would gradually take a greater strain on the cable as it progressed toward deeper water?

A. I assume that you mean by "the length of the grapnel" the depth of the grapnel on its suspending cable.

Q. Yes.

A. If that remained the same and the ship progressed along the course of the cable into deeper water, the strain would necessarily increase.

Q. And as the strain increased would it not progressively mark the cable more and more?

A. Yes.

Q. And if it were carried far enough in deep enough water with a given length of grapnel chain out would it not eventually break the cable?

A. Yes.

Q. In such a situation when it first hooked the cable, if it hooked it in shallow water would it necessarily make any marks on the cable?

A. It wouldn't necessarily make marks on the cable, no.

Q. But it would mark it as it progressed into deeper water with greater strain? [328]

A. As the strain increased, yes, either by progressing into deeper water or by its deviation from

(Testimony of John H. Bowen.)

the course of the cable, moving away from the line in which the cable was initially laid.

Mr. Mikkelsen: No further questions.

Redirect Examination

Q. (By Mr. Morrow): Captain Bowen, who was it who established the position of the Seattle broken end of the cable?

A. The man who was at that time my second mate aboard the ship, Mr. Donald P. Kinney.

Q. Donald P. Kinney. Is Donald P. Kinney the navigating officer?

A. At that time he was, yes.

Q. Is he a competent man in establishing positions? A. Yes.

Q. In your opinion was this position of the broken end of the Seattle cable accurately established?

A. The position of the ship at the time the broken end was brought aboard I would say was accurately established, yes, sir.

Q. What Mr. Kinney was attempting to do then was to establish exactly the position where the break occurred, was he not? [329] A. No.

Q. Well, wasn't that what you did in fact?

A. We know that we cannot establish exactly the position of the broken end, sir, so we established the closest thing we can to it, and that would be the position of the ship at the time the broken end came aboard.

Q. Yes. If you had felt that the broken end

(Testimony of John H. Bowen.)

occurred any place else you would have established that position, wouldn't you?

A. No, we simply establish the position of the ship at the time the broken end comes aboard.

Q. Where is Mr. Kinney now?

A. He's on board the vessel, I think.

Q. Is he available as a witness?

A. I imagine he would be, yes.

Q. He is the one who actually established these positions, wasn't he? A. Yes.

Q. Captain, are there other cables extending out from Pier 57 other than the Fort Lawton cable?

A. Yes.

Q. How many?

A. From the same area—from the area between Pier 57 and Pier 56 the Alaska Communication System has—had at that time two other cables.

Q. Extending out from Pier 57?

A. Actually three, one that had been abandoned some years before. There would have been three other cables extending out.

Q. If a ship had dragged an anchor over the marked cable area it would have picked up these other cables, would it not?

A. No, not necessarily.

Q. Well, not necessarily, but it might have?

A. It could have had it gone far enough south. This cable was the northernmost of those cables.

Q. Well, I understand this one extended outside the boundary of the marked cable area. Captain,

(Testimony of John H. Bowen.)

has the cable area been remarked since the 1955 casualty? A. Yes.

Q. Where is the northerly boundary of the cable area now? A. I don't know.

Q. The cable area has been remarked, has it not, Captain Bowen, to take in the Alaska Communication's Fort Lawton-Seattle cable?

A. I believe it's marked now to include the cable in its entirety from Fort Lawton to Seattle.

Mr. Morrow: Will you read that answer?

The Court: It will be read.

(The reporter read the last answer.) [331]

Q. (By Mr. Morrow): And has the cable area——

Mr. Mikkelborg: If the Court please, objection. We are now getting into what cables existed in 1958 and what areas are shown and plotted in 1958, which are far different from those existing in 1955 with which we are here concerned.

Mr. Morrow: Well, I'm dealing with the cable area and it will save calling another witness if I may ask this witness one or two questions on this subject.

The Court: As a part of your direct examination of this witness?

Mr. Morrow: Yes.

The Court: Be as brief as possible.

Mr. Morrow: Yes.

The Court: You may do it.

Q. (By Mr. Morrow): Captain Bowen, where is the northerly boundary of the cable area now in

(Testimony of John H. Bowen.)

reference to the piers on the waterfront? Where does it start? Does it start from Pier 59 now?

A. I don't know. I haven't familiarized myself with the existing position of that and wouldn't care to state.

Q. Well, can you refer to an up to date chart and just give us that information?

The Court: Let the bailiff assist you. Which exhibit do you wish? [332]

Mr. Morrow: Well, I would just rather have him refer to a chart rather than put another chart in evidence, your Honor.

Mr. Mikkelsen: I object, your Honor. We are objecting to conditions which exist currently and did not exist in 1955.

Mr. Morrow: This witness should be able to answer without reference to a chart.

The Court: That is what I think. I think that is true of nearly all these things.

Q. (By Mr. Morrow): Captain Bowen, you know where the marked area is now, don't you?

The Court: Remember, he is your own witness.

Mr. Morrow: Yes.

Mr. Mikkelsen: I remind the Court that this is direct and that this is the respondent's witness.

Mr. Morrow: Well, I think he has shown a little adversity here, your Honor.

The Court: The Court does not think so. You may proceed.

Q. (By Mr. Morrow): Captain, have you re-

(Testimony of John H. Bowen.)

cently marked or had marked under your supervision the Fort Lawton-Seattle cable?

A. Yes. As a matter of fact, I had the second, or the now first mate, Mr. Kinney, make a copy of the chart which [333] shows our cables so that the chart we have could be turned over as a court exhibit.

Q. You mentioned in your testimony that you knew that the cable area had been enlarged. Can you state where or not it has been enlarged in the vicinity of Piers 57 and 58?

A. I cannot. To be perfectly honest, Mr. Morrow, I've only seen that chart with the recent cable area marked, one glimpse I think either in your office or Mr. Mikkelsen's.

Mr. Morrow: Very well. That's all I have, your Honor.

Mr. Mikkelsen: One question, if the Court please.

Recross Examination

Q. (By Mr. Mikkelsen): Captain Bowen, in Counsel's interrogation the remark was made that the cable in 1955 was outside the boundary of the cable area. From your examination——

Mr. Morrow: The marked cable area.

Mr. Mikkelsen: Very well, the marked cable area.

Q. (By Mr. Mikkelsen): From your examination of the repairs can you state whether or not the cable as laid in 1953 and as plotted following the repair is outside [334] of, that is, is north or

(Testimony of John H. Bowen.)

south, of the cable area boundaries marked on the chart which is labeled Respondent's A-1? Is the cable inside or is it outside the north and south boundaries delimiting the cable area?

Mr. Morrow: I submit the exhibit speaks for itself, your Honor.

The Court: The objection is overruled.

A. The cable is inside the boundaries marked on the chart.

Mr. Mikkelsen: As of what time did you use the word "is"?

A. At the time it was put back in 1953 and so marked on this chart last night.

The Court: That has been said over and over again, I am sure. Anything else?

Mr. Mikkelsen: No further questions.

The Court: Step down.

(Witness excused.)

The Court: We will take a recess in this case until 2:00 o'clock this afternoon.

(Thereupon, at 12:00 o'clock noon a recess herein was taken until 2:00 o'clock p.m.) [335]

Thursday, August 21, 1958. 2:05 o'clock p.m.

(All parties present as before.)

The Court: Counsel, you may proceed.

Mr. Morrow: I will call Captain John Campbell, master of the Princess Louise.

The Court: Come forward. You have already been sworn, Captain. Will you resume the stand for further interrogation as a witness called for the respondent.

JOHN A. CAMPBELL

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Morrow): Will you please state your name, Captain? A. John A. Campbell.

Q. What is your address?

A. 459 Bellville Street, Victoria, B. C.

Q. What is your occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. Since March the 4th, 1937.

Q. By whom are you employed? [336]

A. Canadian Pacific Railway Company.

Q. How long have you been employed by the Canadian Pacific Railway Company?

A. Thirty-five years.

Q. Were you master aboard the Princess Louise in March, 1955, particularly March 21, 1955?

A. Yes, sir.

Q. Would you please describe the Princess Louise as to her length, breadth and dimensions?

A. Well, her length is 420 feet, breadth about 48 feet, and tonnage, 4,000 tons, and she has quite a flaring bow.

Q. What type of vessel is the Princess Louise?

A. Single screw.

Q. In what service was the Princess Louise engaged in March, 1955?

(Testimony of John A. Campbell.)

A. Passenger and freight service on the B. C. coast runs in general.

Q. Is she a passenger ship? A. Yes, sir.

Q. What run was she on in 1955 in March?

A. She was running between Victoria, Seattle and Vancouver.

Q. In the passenger trade principally?

A. Yes, sir.

Q. What is the approximate dead weight tonnage of the Princess Louise? [337]

A. Approximately 4,000 tons.

Q. Would you describe her characteristics?

A. Well, she is a single screw with reciprocating engines.

Q. What are her characteristics in respect to her bow?

A. Well, she has what is described as a large flare on the bow.

Q. And how does that distinguish her from other vessels?

A. Well, a coasting vessel should be more or less straight sided.

Q. What effect does the characteristic of the flare of the bow have in connection with docking operations? A. It makes it more difficult.

Q. In what respect? Will you please describe that?

A. Well, unless you come in flat against the wharf, if the bow is at any angle it will come in contact with any buildings or passenger ramps or anything that are close to the face of the wharf.

(Testimony of John A. Campbell.)

Q. Are you familiar with the customary manner of docking the Princess Louise at the Canadian Pacific Railway dock in Seattle? A. Yes, sir.

Q. Would you describe how that is usually done?

A. Well, it's usually done by coming in as close to the pier on the opposite side of the dock as possible, preferably—— [338]

Q. Now, when you refer to the pier on the opposite side of the dock, what did you——

The Court: Did you wish to interrupt him? He had not——

Mr. Morrow: Yes, I wanted to interrupt him, your Honor.

The Court: You may proceed.

Q. (By Mr. Morrow): What pier do you refer to?

A. Well, I refer to Pier 63, which would be on your starboard side, when making a port landing at the Seattle dock.

Q. Yes. Now will you just continue with your description of the usual method of docking the Princess Louise at the Canadian Pacific dock?

A. Well, you come in ordinarily as close as possible to the wharf or the dock on the other side as I described, Pier 63, on port helm, the idea being that when you come astern the stern will go to port and the bow to starboard.

Q. Now, under normal weather conditions how does the Princess Louise back?

A. She backs to port.

(Testimony of John A. Campbell.)

Q. Have you had occasions to dock the Princess Louise in the face of a strong southeast wind?

A. Yes, sir.

Q. How frequently will that situation arise during the Winter time, Captain? [339]

A. Well, during the period that vessel is on the run it might occur anything up to half a dozen times.

Q. Now, what is the usual and customary manner in which the Princess Louise is docked in the face of a southeast wind during the winter time? Can you describe that?

A. Well, usually with the aid of the starboard anchor.

Q. Will you just continue and describe the maneuver under circumstances where in the winter time you dock in the face of a southeast wind?

A. Yes, sir. Well, coming down from Four Mile Rock to a position off the CPR wharf and turning on port helm and approaching at as slow a speed as possible and dropping the starboard anchor within about 900 feet off the face of Pier 63 which you are keeping close up to, the idea of that being that you can control the ship's speed better and you get the advantage of being able to use the engines and get the effect of the rudder.

Q. Now will you state, Captain, your reference to port helm, is that a left turn?

A. That is left, sir.

Q. Now will you please state whether or not during the winter time in the face of a southeast

(Testimony of John A. Campbell.)

wind you hold a little wider of your course than when the weather conditions are normal? [340]

A. That is correct.

Q. Captain, is it in your opinion feasible or practical to dock the Princess Louise by laying her port side along the face of the Canadian Pacific dock and putting a line on the dock and warping the vessel around the dock and into position?

A. In my position it is not feasible.

Q. And why not?

A. For the same reason I explained before, with the flaring bow and the buildings close to the corner of the wharf, it would be hard to do without inflicting damage to the wharf and the ship.

Q. Have you had any experience in docking the Princess Louise in that manner?

A. Not at Seattle, sir.

Q. Captain, getting now to the date March 21, 1955, can you state what time the Princess Louise docked at the Canadian Pacific dock? And I might say you may refer to your log which is in evidence as Respondent's Exhibit A-7. That is the pilothouse log.

(The exhibit was handed to the witness.)

A. The Princess Louise docked at Seattle March the 21st at 3:48 p.m.

Q. What were the weather conditions existing at and shortly prior to the time of docking? [341]

A. Southeast gale wind.

Q. And a southeast gale, how would you describe that in terms of miles per hour?

(Testimony of John A. Campbell.)

A. Well, on this particular day in question in miles per hour I would say forty miles per hour.

Q. Now, what was the state of the tide?

A. The tide was at 1441, which was approximately the time we were maneuvering there, 9.4 feet.

Q. Would that be a flood tide?

A. The tide was flooding, the last of the flood.

Q. Would the height of the water which you mentioned, 9.4 feet, be water in addition to that indicated on the navigation charts?

A. Yes, sir.

Q. Captain, during that period, March 21st or 22nd in 1955, did you have any information or knowledge of your starboard anchor fouling a submarine cable in the Seattle harbor?

A. No, sir.

Q. When did you first hear of any such claim?

A. To the best of my knowledge it was three weeks later.

Q. Captain, what was your scheduled arrival at the Canadian Pacific dock on March 21, 1955?

A. 2:45 p.m.

Q. Would you describe what occurred during your approach [342] to the dock until the time of docking, please? Just briefly.

A. Well, on my first approach I found that when I was getting close to my position to enter between the two docks, the CPR dock and No. 63, that the ship was a little out of position to what I wanted. In other words, her stern was too close

(Testimony of John A. Campbell.)

to Pier 63, and at the last moment I decided it was better to back out and try again.

Q. Now, prior to backing out did you follow the usual procedure in respect to dropping the anchor?

A. Yes, sir.

Q. Under that type of weather conditions?

A. Yes.

Q. And what was that? What was done?

A. Well, on the way in from Four Mile Rock to position from the CPR wharf I instructed Mr. Hodge, first officer, to go down and have the anchor handy. In fact I instructed him to heave it out to fifteen fathoms under water and to stand by on the forecastle head and I would signal him when to drop it an additional fifteen fathoms, making the total in the water thirty fathoms.

Q. And was the anchor dropped to 30 fathoms?

A. Yes, sir.

Q. Now, where would that 30 fathoms begin? Would that begin, for example, at the bow of the ship or at the water level?

A. That was at the water level.

Q. So that there would be 30 fathoms of——

A. Chain.

Q. ——cable to the anchor, is that correct?

A. Yes.

Q. Now, what was the position of the Princess Louise on this occasion in reference to any dock along shore when you dropped the anchor?

A. She was about 900 feet from the southwest corner of Pier 63.

(Testimony of John A. Campbell.)

Q. How did that compare, Captain, to previous occasions on which you had made or attempted a landing in the face of a southeast gale?

A. Very similar.

Q. Now, Captain, directing your attention now to where you left off in your testimony, you stated that you backed the vessel down. Will you take up the narrative of your story there and state what occurred from then on?

A. Well, when I discovered that I had to back out I put her full astern, and first of all she backed in the direction she should with the action of her propeller, which is to the left. Or port, excuse me.

Q. Now let me interrupt just a minute, please, Captain. You had previously indicated that under normal conditions, [344] normal weather conditions, if I recall correctly, that the Princess Louise backs to the right. Now, what is her action——

A. No, she backs to the left, sir.

Q. She normally backs to the left?

A. Yes. Didn't I say left?

Q. Well, you probably did. Now, what is her backing action under conditions where you have a southeast wind?

A. In the first instance she will follow her natural inclination to go to the left, but in a short period of time she will back to the right, the wind influence blowing the bow down and the stern going up into the wind.

Q. I see. Captain, during this backing maneuver

(Testimony of John A. Campbell.)

was there any leeward action of the vessel in the face of the southeast gale then existing?

A. Oh, yes, there was a considerable amount. It's hard to judge, but it would be a considerable amount.

Q. Now, when I use the term "leeward," what direction would that be generally on the chart?

A. Northwesterly.

Q. Northwesterly. All right. Now, how far approximately did the vessel back on this occasion?

A. Well, as I recollect, down as far as the Bell Street wharf, and that is the next pier down. [345]

Q. Do you mean the next pier northerly?

A. In a northwesterly direction.

Q. I see.

A. And then when I got out clear, what I figured turning room to come ahead on port helm, I put the engines ahead and steamed around on left rudder to get back to my position to attempt another landing.

Q. Now, when you say you steamed around on the left rudder, do you mean a left circling motion? A. Yes, sir.

Q. I see.

The Court: That was by having your rudder to port, your rudder pointing in the direction of the port side?

A. Yes, sir.

The Court: And that brought the bow of the ship around in a curve to the same side?

A. That's right, yes.

(Testimony of John A. Campbell.)

The Court: You may proceed.

Q. (By Mr. Morrow): All right, Captain, will you just continue the story of the maneuver of the Princess Louise after you started this port turn?

A. Well, as I recollect the tug Titan came along and offered assistance, and I accepted.

Q. Yes. Where was the Princess Louise when the Titan came alongside? [346]

A. Well, we were, as near as I can recollect, turned around and heading back in a southwesterly direction.

Q. Now, in what manner did the tug Titan render assistance to the Princess Louise on this occasion?

A. Well, he was secured to the stern, or starboard quarter of the Princess Louise, with his own towline.

Q. Was there any officer of the ship who had duties in connection with the tug?

A. Yes, the first officer, Mr. Hodge, who had been forward in the first attempt to land, was back looking after the making fast of the tug.

Q. Was First Officer Hodge stationed at the stern of the Princess Louise during the time that the tug Titan was rendering assistance?

A. Yes, sir.

Q. Now, what maneuver did the Princess Louise then make with the assistance of the tug Titan?

A. Well, we maneuvered back up the harbor into the same position as we had been before.

Q. Now, when you say—pardon me.

(Testimony of John A. Campbell.)

A. I made a point of coming in with a line between the CPR dock and this same Pier 63 that I mentioned before, and with that——

Q. Now,—— [347]

The Court: The witness still is not quite finished, Mr. Morrow.

Mr. Morrow: Yes. I would like to interrupt, if I may.

The Court: You may do that.

Q. (By Mr. Morrow): Captain, how did your course in approaching Pier 64 on the second approach compare to your course on the first approach?

A. Well, there was very little difference. That is the position I try to get in to make the landing under those conditions.

Q. Now, what effect did the Titan have upon the Princess Louise during the second attempted docking operation?

A. Well, he counteracted the effect of the wind on the stern.

Q. During this maneuver from the time you first dropped your starboard anchor what was the situation in respect to that starboard anchor?

A. It was still in the position that we had put it when we made the landing, 30 fathoms in the water.

Q. Did you have any purpose in leaving the anchor out at 30 fathoms?

A. Yes, sir. I didn't see any point in heaving it in, as according to the depth of the water shown

(Testimony of John A. Campbell.)

on the chart and the position that I was approaching from. [348]

Q. What would be the advantage of leaving your anchor at 30 fathoms, Captain?

A. Well, it would take bottom at the nearest point when the water was 180 feet deep.

Q. Did you consider that a proper precaution to take at that time? A. Yes, I did.

Q. Now, what other action or maneuvers were taken, Captain, in connection with the second approach?

A. Well, at the second approach, as I mentioned, Mr. Hodge was back aft, and there's a telephone connection between the stern and the bridge, and he was directing the operations, the speed, whether to increase the speed of the towboat or reduce it, in accordance with my maneuvers, and Mr. Ward, second officer, who had come up to the wheelhouse during this maneuvering, I sent him forward to look after the operation of the anchor.

Q. Was there anybody stationed at the anchor windlass up forward? A. Yes, sir.

Q. And what was his name?

A. His name was John Guiney.

Q. Captain, was any further action taken on either the starboard or the port anchor before you docked?

A. No further action was taken with the starboard anchor, [349] but I had instructed Mr. Ward before he went down that I would signal him as we approached the wharf if I wanted the port an-

(Testimony of John A. Campbell.)

chor let go. As the ship approached the wharf I signaled him to let go the port anchor.

Q. And how far was the ship from the wharf when the port anchor was dropped?

A. Right between the two wharves, at the extreme seaward end.

Q. Now, Captain, how long did the Princess Louise remain at the Canadian Pacific dock before departure? A. Twenty-one minutes.

Q. And what time was the departure?

A. 5:09—no, pardon me, correction on that.

Q. You may refer to your log.

A. An hour and 21 minutes.

Q. An hour and 20 minutes later. Now, on departure, Captain, what maneuvers did the vessel make?

A. When the vessel was alongside I hove up the port anchor and on leaving as we backed out we hove up the starboard anchor.

Q. Will you state whether that procedure is customary and usual?

A. Yes, it's quite common.

Q. Captain, when you made the first approach to the Canadian Pacific dock can you state within what distance the [350] Princess Louise was of the outer end of Piers 57 and 58? In other words, the closest distance that you got to those piers on the first approach.

A. Well, I would say approximately four and a half cables.

Q. What is a cable, Captain?

(Testimony of John A. Campbell.)

A. A cable is a tenth of a mile, two thousand yards.

Q. What was the closest distance that you came to the piers, that's the outer end of Piers 57 and 58, on the second approach?

A. Well, I came in as near as possible to the same position, making the same kind of a turn.

Q. Captain, I would like now to refer you to Respondent's Exhibit A-1, which is a navigation chart which has been identified as corrected to March 21, 1955.

(The exhibit was handed to the witness.)

Q. On the chart appear some red lines in the vicinity of Pier 64 and the Bell Street terminal which have been identified as the Fort Lawton-Seattle cable then existing on March 21, 1955. Can you tell us, please, what the distance of the said cable is off the face of the Canadian Pacific dock?

A. Do you mean the outer end of the cable area?

Q. Not the cable area. Do you find the red lines? A. Not the cable area lines?

Q. No, not the cable area lines. There's a red line with—there are four little tiny circles. [351]

A. Oh, yes, I see what you mean.

Q. Now, that part which you identify now has been previously identified as the place of the Fort Lawton-Seattle cable, and repeating my question, what is the distance between that cable and the face of the Canadian Pacific dock?

A. The nearest point?

Q. Yes. A. 890 yards.

(Testimony of John A. Campbell.)

The Court: Between what two points, please? Repeat.

A. That is the nearest point of the red line marked as the Fort Lawton cable and the southeasterly corner of the CPR wharf, sir.

Q. (By Mr. Morrow): Now would you check that? Is that in terms of yards or feet? Would you check your——

A. That is in term of yards—oh, no, wait a minute.

The Court: 800 yards?

A. No, I'm talking about feet. Pardon me. I transposed it into feet. 890 feet.

The Court: 890 yards, or do you mean feet?

A. I mean yards.

The Court: Captain, it is a common thing for one like me to do that exact thing, so do not be embarrassed about it. Just correct it if you discover [352] it in time. 800 yards was the closest——

A. 890, sir.

The Court: 890 yards was the closest point on established cable line?

A. That's correct.

The Court: From the CPR——

A. The southeast corner of the CPR dock.

The Court: Which corner?

A. The southeast.

The Court: From southeast corner of the CPR dock?

A. Yes, sir.

The Court: Is that what he said?

(Testimony of John A. Campbell.)

Mr. Morrow: Your Honor, I'm afraid that the witness and I are not talking about the same thing. I'm afraid he has——

The Court: I would like to have this information.

Mr. Morrow: I would, too.

The Court: If the witness feels that his statement is still correct, then you can repeat your question to the witness.

Mr. Morrow: Well, I can't see where he is measuring from.

The Court: Will you state again from what [353] point you are measuring, Captain?

A. I'm measuring from the southeast outer end of the CPR wharf, sir.

The Court: Will you take that map with you and the calipers and dividers down to Counsel table and within the view of both Counsel point out what you there are doing, Captain?

A. Yes, sir.

The Court: In that space there between the two Counsel.

(Witness goes to Counsel table with Respondent's Exhibit A-1.)

Mr. Morrow: The witness has discovered a slight correction. I think he can correct it on the stand.

The Court: He may make the correction from the witness stand.

(Witness returns to stand with exhibit.)

The Court: You were discussing the distance be-

(Testimony of John A. Campbell.)

tween the closest point on the established cable line from the southeast corner of the CPR dock.

Mr. Morrow: Yes.

Q. (By Mr. Morrow): Now, Captain, you have indicated you misspoke yourself. Will you please now state the measured distance from Pier 64 to the cable? [354]

A. I make that distance 290 yards.

Q. 290 yards? A. Yes.

The Court: The distance in question now on the 290 yard statement is the same distance that you spoke of the last time you mentioned this?

A. Yes, your Honor.

The Court: You may proceed.

Q. (By Mr. Morrow): Captain, what is the distance from the face of the Bell Street Terminal—do you know what I refer to when I say “the Bell Street Terminal”? A. Yes, sir.

Q. How is that indicated on the chart? Is there any designation there that—it says, “Port sign N. limit. Tank. Port sign N. limit”?

A. That’s right.

Q. What is the distance from there, from the face of the dock to the marked Fort Lawton cable?

The Court: The same cable but a different starting point, is that right?

Mr. Morrow: That’s right, your Honor.

The Court: And the starting point is what in your question?

Mr. Morrow: From the Bell Street Terminal.

The Court: Bell Street. [355]

(Testimony of John A. Campbell.)

A. Now, that's a fairly long wharf, sir. Do you want the nearest point, or——

Q. (By Mr. Morrow): Well, from the southerly point. A. The southerly point.

The Court: Do all agree what the number of that dock is, 67? Is Bell Street No. 67?

A. 66, sir.

The Court: The witness says 66, but I am sure someone has referred to it as——

Mr. Morrow: If I may refer to Respondent's Exhibit A-9——

The Court: Does it give the number?

Mr. Morrow: Yes, your Honor.

The Court: What is Bell Street's number?

Mr. Morrow: I'll have it in just one moment. A-9 is this chart right here, a map of the Seattle harbor.

The Court: Let Counsel have it.

(The exhibit was handed to Mr. Morrow.)

Mr. Morrow: That is 66, your Honor, and on this Port of Seattle Harbor map it is also designated as Bell Street, abbreviated "St."

The Court: You may proceed.

Q. (By Mr. Morrow): Captain Campbell, have you computed that distance? [356]

A. Yes, sir. I make it 370 yards.

Q. Very well. Now, Captain, had you any knowledge or information that the Seattle-Fort Lawton cable or any other cable lay off the Canadian Pacific and the Bell Street terminals as indicated by the red line on Respondent's Exhibit A-1?

(Testimony of John A. Campbell.)

A. No, sir.

Q. When was the first time that you had any knowledge that the cable extended in this position off the dock?

A. When I looked at this chart.

Mr. Morrow: You may inquire.

The Court: When did you look at the chart, with reference to Respondent's Exhibit A-1?

A. Sir, this is the first time I've seen it.

The Court: You may proceed.

Cross Examination

Q. (By Mr. Mikkelsen): Captain Campbell, referring to those measurements you have just made, how deep is the water at the point which you placed your dividers to locate the distance you stepped off from both the Bell Street Terminal and the CPR dock, the offshore terminus of the same distance?

A. The offshore terminus of the same distance?

Q. The same two distances. [357]

A. You mean in line with the pier?

Q. As I understand your testimony, you have measured the distance from——

A. The southeast corner to the nearest approach of the cable.

Q. Yes, and I wish to know the depth of water——
A. At that point?

Q. At the point where you touched the cable with your dividers to indicate the total distance.

(Testimony of John A. Campbell.)

A. From the CPR dock to the cable the nearest depth recorded is 197 feet.

Q. Is that the depth at the position your dividers touched the cable?

A. That's the nearest depth, sir, and it's only a matter of a few yards.

Q. Very well, and the other terminus of the other distance at the cable, what depth is shown there?

A. The nearest depth recorded, which is to the shoreward side of the cable, is 160 feet.

Q. How far from the cable is that nearest sounding?

A. Approximately 90 yards.

Q. What is the nearest sounding to seaward of the cable at that point?

A. On the seaward side of the cable?

Q. Yes, at that point. I'm not interested in the distance, [358] Captain, right away. I just want to know what the sounding is.

A. Oh, I'm sorry, I thought you wanted the distance. From that point, 239 feet.

Q. So is it correct then——

A. On one side, and it's practically the same on the other, 197.

Q. Am I correct in——

The Court: Is that still depth you are talking about?

A. Yes, sir.

Q. (By Mr. Mikkelborg): Is it correct then that the cable at that point to which you measured lies

(Testimony of John A. Campbell.)

between a sounding of 160 feet on the inshore side and 200 and what did you say on the offshore side?

A. 239.

Q. 239 feet. Very well.

The Court: What was that greatest depth? How many feet was that greatest depth?

A. 239, your Honor.

The Court: 239. How far in horizontal distance is that 239 measurement or depth from the dock?

A. From the dock, sir, from the CPR dock?

The Court: Yes.

A. About 610 yards. [359]

The Court: The latter depth, 239, is that the one?

A. That's the one.

The Court: Six hundred and how many yards?

A. 610 yards.

The Court: What general direction, southwesterly or what?

A. Southwesterly, yes, sir.

The Court: You may inquire.

Q. (By Mr. Mikkelborg): Captain, I may have misheard your response to Counsel regarding the description of your ship, the Princess Louise, but I thought you said 420 feet. Did you mean to say 420 feet? A. 320 feet, sir.

Q. I thought so. With regard to the configuration of her bow, the flare of that bow, how high above the dock, the stringer on Pier 65, is that bow at high tide such as you testified you had that day?

A. Approximately eighteen, twenty feet.

(Testimony of John A. Campbell.)

Q. Above the dock, is that correct?

A. At high water.

Q. Captain, how long had you been on this run before March 21, 1955?

A. On this particular ship about five weeks, as I remember it. [360]

Q. In response to a question by Counsel on direct you said in making your approach on this day because of the gale you went wide of your course. I believe those were the words you used.

A. That is correct.

Q. By that do you mean you rounded further to the south in making your turn?

A. Slightly.

Q. You testified as to the height of the tide at that time, at the time you were docking.

A. Yes.

Q. Where did you get that figure?

A. From the tide book.

Q. And is that a predicted figure or is that an actual figure? A. It's predicted.

Q. Captain, how heavy was your anchor, if you know, on the Princess Louise?

A. I couldn't say for sure, but I'd say approximately 2,500 pounds.

Q. About a ton and a half?

A. Ton and a quarter.

Q. Ton and a quarter. You testified as to having two shots of chain. Do you know how heavy one shot of chain is on the size chain you used at that time? [361]

(Testimony of John A. Campbell.)

A. No, I'm afraid I don't.

Q. Have you any idea? Do you know what size chain it is?

A. Yes, about an inch and a half.

The Court: That is the diameter of the metal in forming a link of the chain?

A. I'm referring to the diameter.

The Court: That is what I meant. That is not a very heavy or large, strong chain, is it?

Q. (By Mr. Mikkelborg): Is it correct, Captain, that each link is forged from steel bars of—what diameter did you say?

A. About an inch and a half. It might be a little more, but not much.

The Court: Is that regarded as being strong enough to hold the anchor of a ship the size of the Princess Louise?

A. Yes, sir, I'd say so. They were tested and put aboard the ship with that in view.

The Court: You may proceed.

Q. (By Mr. Mikkelborg): As I understand your testimony, Captain, you were scheduled to arrive at the CPR dock, Pier 64, on the date of March 21st at 2:45, is that correct?

A. That is correct, sir.

Q. And you stated you made your arrival at 3:50, or 3:48 I believe you said. [362]

A. 3:48 I think it was.

The Court: You arrived where at that time?

A. At the Seattle wharf, sir. 3:48 it has in the log book. Now I'd like to mention at this time

(Testimony of John A. Campbell.)

that there was considerable delay entailed after the vessel came alongside before this time was put down.

Q. (By Mr. Mikkelborg): What time did you ring off your engines?

A. This refers to the time we finished with engines, 3:48.

Q. Are you quite certain of that?

A. Yes, sir.

Q. Was it your custom on the Princess Louise to keep what mariners refer to as a bridge bell book? A. We never kept one.

Q. Now, Captain Campbell, you testified that the reason you elected to back out and try another landing was that your stern had drifted down too close to I believe you said Pier 63?

A. No, Pier 64 was the dock I was going to land at.

Q. Thank you. I wasn't sure. Pier 64 was the dock where you intended to moor?

A. That's right.

Q. And I believe it was your testimony that the wind blew the stern downwind. [363]

A. That is correct.

Q. What means did you have to hold the bow up into the wind?

A. By that time the anchor had taken aholt and was steadying the bow.

Q. The ship's propeller and rudder are at the stern, are they not? A. That is correct.

(Testimony of John A. Campbell.)

Q. Is it true that you were unable to hold the stern upwind with the use of propeller and rudder?

A. At that particular time in the position I was in I couldn't afford to go ahead, and that's the only way I could have gotten any action.

Q. Now, Captain, with respect to the anchor again, you testified you dropped—no, you testified you heaved out fifteen——

A. Fifteen fathoms.

Q. And dropped an additional fifteen?

A. Yes, sir.

Q. With the dropping of the additional fifteen fathoms, what do you mean by that as distinguished from your first fifteen that you heaved out? What is the difference between heaving out fifteen and dropping fifteen?

A. Well, when you heave it out you lower it with the windlass in gear. [364]

Q. Over the wildeat, is that not right?

A. That's right.

The Court: Over the what?

A. The wildeat. It's shaped to fit the links.

Q. (By Mr. Mikkeltorg): So it is very easily controlled, is it not, then, Captain?

A. That is right.

Q. Now, when you dropped the second fifteen fathoms, this is additional weight, is it not?

A. That's right.

Q. And how was that controlled?

A. That was controlled by the brake.

(Testimony of John A. Campbell.)

Q. And is it not true that that is a friction brake? A. That is right.

Q. How did you know that fifteen fathoms was dropped, that particular amount, how did you know that it was not more or less?

A. Well, it's open to doubt, no doubt, but the fact remains that when you heave out fifteen to start with the anchor doesn't gain so much momentum and the position I dropped the last fifteen was close in to our wharf where the depth was getting less all the time, and therefore we had easier control.

Q. Were you able to see any marks on the chain? [365]

A. Not from my position.

Q. Were there any marks on the chain?

A. In what—what manner of marks do you mean?

Q. Well, how does one tell when one has fifteen fathoms out or fifty fathoms out?

A. Well, each fifteen fathoms is marked with a shackle and the previous links are painted white, so that when they come up the hawse pipe you have a warning.

Q. Were you able to see those marks?

A. I was not in a position to see them.

Q. Isn't it true, Captain, that the flaring bows you have referred to make it difficult to see anywhere down near the forefoot of the vessel?

A. Well, if you were up on the bow it might be difficult.

(Testimony of John A. Campbell.)

Q. I'm speaking of from the bridge.

A. Oh, from the bridge it's impossible no matter what the bow is.

Q. When you say you dropped the second fifteen fathoms fairly close in, did you make a record of that position? A. No, only by eye.

Q. Did you make a record of the position when you first dropped any of the anchor chain at all?

A. I know where it was, when we first put the engines on slow off of the Bell Street Terminal.

Q. Were there any visual bearings taken to fix the ship's position at that time? [366]

A. Only by myself by eye, in line with the wharves.

Q. Did you record such bearings at that time?

A. No, sir.

Q. Were there any visual observations taken to fix the position of the ship during your approach?

A. Yes, I watched Pier 63 and Pier 64.

Q. Were any of those observed positions recorded or plotted?

A. No. That was never customary to be done.

Q. Do you have any record whatever of the position the ship was in during this approach?

A. Nothing in writing.

Q. Is it all based on your memory?

A. Yes, and what we do in common practice.

Q. How long ago was that, Captain?

A. Well, it was about three and a half years.

Q. With respect to use of the tug, Captain

(Testimony of John A. Campbell.)

Campbell, why did you elect to use the tug on your second approach?

A. Well, I considered he would be of assistance.

Q. Did you state that your position as you began your second approach with the use of the tug was substantially the same as the position you were in at the beginning of your first approach?

A. Not when I first hooked the tug on, but when I turned in towards the wharf, yes. [367]

Q. Why did you let go your port anchor, Captain? A. For additional safety.

Q. Was there a question in your mind concerning the control of the ship?

A. There was room to doubt that the starboard anchor would be effective enough to hold her off the CPR wharf, so I dropped the port anchor to support it.

Q. Had you at any time paid out any additional chain on the starboard anchor to assist in holding?

A. No, sir.

Q. Captain, you testified regarding your position off Pier 57. Did you make any observations and record any observations of that position at the time? A. No, sir.

Q. Captain, we seemed to have had some difficulty with distances. You were asked how far off Pier 57 you were and you said four and a half cables. You were asked——

A. That's approximate.

Q. Yes. And you were asked how long is a

(Testimony of John A. Campbell.)

cable, and I may have misunderstood you but I thought you said two thousand yards.

A. It's a tenth of a mile.

Q. Is two thousand yards?

A. No, two hundred yards.

Q. Beg your pardon? [368]

A. Two hundred yards.

Q. Two hundred yards. If you said two thousand yards you didn't intend that, did you?

A. No, I didn't, and I believe I did when I come to think of it.

Q. You believe you did say two thousand yards?

A. I believe you're right.

The Court: You said two thousand feet, I thought.

Mr. Morrow: Yes, he said he was two thousand feet off.

The Court: Now you wish to change that to two hundred feet, or what is it, two hundred yards? What is it?

A. The length of a cable, sir, is the question, I believe.

The Court: We are thinking about different things, I imagine.

Q. (By Mr. Mikkelborg): You were asked on direct examination, Captain, how far off Pier 57 you were during this maneuver and you said about four and a half cables?

A. Yes, that's right.

Q. And then you were asked how long is a

(Testimony of John A. Campbell.)

cable and it was my impression you said two thousand yards.

A. I could have said that. [369]

Q. You did not intend to say that?

A. No, I didn't.

The Court: What did you mean, two thousand feet or two hundred yards?

A. Two hundred yards.

The Court: Two hundred yards. I am not sure that we are thinking about the same thing.

Mr. Morrow: No, your Honor. There are two things involved here. One is how long is a cable. The witness testified four and a half cables. I don't recall that he testified as to the length of a cable on his direct examination.

Mr. Mikkelborg: I believe the record will show he was asked precisely that, "How long is a cable," and he said, "Two thousand yards."

Mr. Morrow: I don't think he said any such thing.

The Court: You may proceed.

Q. (By Mr. Mikkelborg): What is your testimony now, Captain, as to the length of a cable, you being four and a half cables as far as you can recall off Pier 57?

Mr. Morrow: Now I object to that question, it's double-barreled. "How long is a cable" is one question.

The Court: That objection is sustained. [370]
Just ask the specific question you wish to ask.

Mr. Mikkelborg: Yes, if it please the Court.

(Testimony of John A. Campbell.)

Q. (By Mr. Mikkelborg): You testified you were four and a half cables off Pier 57?

A. Yes, sir, approximately.

Q. Would you now state what your testimony is as to the length of a cable?

A. Two hundred yards.

Q. Two hundred yards? A. Yes.

Q. With respect to that position, Captain, were any observations taken and recorded?

A. No, sir.

Q. How did you establish that you were four and a half times two hundred yards off Pier 57?

A. Well, by my usual position and where I turn with relation to Pier 64 and Pier 63.

Q. How did you determine that?

A. By the angle of the two wharves by eye.

Q. By eye. Is that what is sometimes referred to as seaman's eye?

A. Well, I suppose you could call it that.

Q. And is it not true, Captain, that that was your estimate as you now recall it?

A. Well, it's not an unusual occurrence. It's a [371] position that we take during the weather that was in force that day.

Q. I believe it was your testimony that you had experienced weather of that nature, I think you said a half dozen times.

A. It could be a half dozen times. I didn't say that I was there all the time.

Q. I see. Do I understand correctly that it could have been a half dozen times during the period in

(Testimony of John A. Campbell.)

which you have been running into Seattle with one of the Princess boats?

A. Oh, no, much oftener than that.

Q. I see. A half a dozen times during the five weeks——

A. The Princess Louise was only a relief ship on the run for approximately six weeks.

Q. I believe you testified that you had commanded her for some five weeks before this occasion, is that correct? A. That's right.

Q. Is there any record at all, either on your charts or in your log books, and would you have made any record of the position in which you now say you were in off Pier 57 on March 21, 1955?

A. No, sir, there is no record that I know of, and it wasn't customary.

Q. It's all based on your recollection at this time? [372] A. That's right.

Mr. Morrow: Well, I wish to state to Counsel that there is this chart which I offered in evidence or offered to be marked as an exhibit which is in existence.

Mr. Mikkelborg: The objection to that, if the Court please, still stands, in that the markings on that exhibit were not prepared on March 21, 1955 or anywhere near that time, they were prepared during the last two or three days.

Mr. Morrow: I was just making a statement for Counsel.

The Court: That covers it. As usual, neither Counsel's statement can help the other. Proceed.

(Testimony of John A. Campbell.)

Q. (By Mr. Mikkelborg): Now, Captain, were you pretty busy on the bridge of the Princess Louise during this docking, or did you have ample time?

A. Well, I was as busy as one would ordinarily be under the circumstances. You're watching what's going on, you're setting drift, and——

Q. Who issues orders to the engine room telegraph, Captain? Do you or does someone else?

A. I do.

Q. What was your answer with regard to whether or not you were busy? [373]

A. Well, if you can call that busy. It's just a question of watching the position of the ship.

Q. You were concerned with the safety of the passengers and your schedule and many things, were you not?

A. Well, I wouldn't say that. The ship is quite seaworthy and there was no occasion to worry about anything happening. The only—my main concern was getting alongside without doing any damage to the wharf or the ship and keeping clear of the cable area.

Q. You were concerned with keeping clear of the cable area?

A. Well, I certainly knew it was there. It's marked on the chart.

Q. Had you ever noticed the signs?

A. Yes.

Q. What do those signs say?

A. It says, "Cable area, keep clear."

(Testimony of John A. Campbell.)

Q. Does it say anything about——

A. "Do not anchor."

Q. It says, "Do not anchor"? A. Yes.

Q. So is it true, Captain, that the reason there were no records made of your position at the time was that you were rather concerned and busy handling the ship? Is that not so?

A. It is the usual practice that we never keep any records [374] unless there is something, some incident occurs, and in this case I had no reason to think anything was out of the ordinary.

Q. Would you recall, Captain, thinking back to that docking, whether there was a usual number of engine orders rung on the telegraph issued by you or an unusual number under those circumstances?

A. Well, under those circumstances there's always more than under normal circumstances, because that is how you keep the ship in position where you want it, slow ahead or slow astern or dead slow, there's all kinds of different movements involved, just according to the set of the ship.

Q. Would you say you were in trouble at any particular time during this maneuver?

A. No, I would not.

Q. Would the fact that from the time you rang down "Stand by," "Stand by" to the engines beginning your approach until the time you rang down "Finished with engines," would the fact that there were some forty-four bells give you any indication of whether it was a troublesome docking or a routine docking?

(Testimony of John A. Campbell.)

A. Well, I would say it was troublesome, but it doesn't necessarily follow that the vessel was in trouble.

Q. Do you recall, Captain, any periods in there when you [375] might have given as many as four engine orders within the same minute?

A. Yes, that's possible.

Q. But that doesn't indicate that you were in any trouble?

A. Not necessarily. All I was trying to do was get down on that wharf at a certain bearing.

Q. Would the fact that you rang up "Slow astern" at 1531 and "Full astern" at 1531, that is 3:31 in terms of standard time, and "Stop" at 3:31 and "Slow ahead" at 3:31 indicate that you were in any difficulty in your mind?

A. No, it indicates that I might have changed my mind at a certain point there.

Q. Does it indicate there was some problem in controlling the ship?

A. It indicates that that was when I had to either get in between the piers or back out, I would assume, but those movements.

Q. Would that also be your conclusion as to a stop bell at 1532 and a dead slow ahead bell at 1532 and a slow ahead bell at 1532 and a stop bell at 1532?

A. Well, I couldn't say offhand now what it would mean.

Q. Is it your testimony that your usual ap-

(Testimony of John A. Campbell.)

proach in that kind of weather was to go upwind and come down toward Pier 64? [376]

A. That's right.

Q. Usually without the aid of a tug, is that correct? A. Yes.

Q. Are you required to account to the owners when you use a tug under those circumstances?

A. No, I'm free to use a tug at my own discretion.

Q. But you decided you didn't need a tug on this day?

A. I didn't think it was necessary, but after the first approach I considered that he would be very useful.

Q. Captain, are you familiar with the ground tackle on the Princess Louise, that is the anchor arrangements?

A. Well, I'm fairly familiar with it.

Q. Is there any bending shot or connecting shot between the fifteen fathoms immediately above the anchor and the anchor shank itself?

A. Just what do you mean?

Q. Well, when you refer to the first fifteen fathom shot—— A. Yes.

Q. Is there any additional chain between the lower end of that shot and the anchor itself?

A. It's just a special shackle.

Q. Just a special shackle. How long is the shank of the anchor itself, Captain?

A. Approximately six feet.

Q. Six feet? [377]

(Testimony of John A. Campbell.)

A. Eight feet, I'll say.

Q. Eight feet? A. Yes, sir.

Q. It's a ton and a quarter anchor with a shank eight feet long?

A. Approximately eight feet.

Q. It might be longer than eight feet, might it not? A. No, not much.

Q. When that anchor is on the bottom, Captain, whether it's level on the bottom or not particularly level on the bottom, is there any visible effect on the chain where the ship also has some headway or some sternway?

A. Yes, the chain would lead aft if the ship had headway and it would lead ahead if the ship had sternway.

Q. That would also be the case, would it not, Captain, if the anchor were on the bottom?

A. That is quite correct.

The Court: At this time we will take a ten minute recess.

(Short recess.)

The Court: You may proceed.

Q. (By Mr. Mikkeltorg): Captain, with respect to the tug Titan, did you or someone in your shore organization send the tug out or did you order it sent out?

A. No, to the best of my knowledge, no. [378]

Q. The tug just appeared there?

A. The tug I believe was sent out by the manager of the towboat company.

(Testimony of John A. Campbell.)

The Court: Is the name spelled T-i-t-a-n, Captain? A. Yes, sir.

Q. (By Mr. Mikkelborg): Do you recall ever making a statement to the effect that Mr. McLean of your shoreside office sent the tug out?

A. I assumed that he had.

Q. Oh, I see, you assumed he had?

A. When the towboat came out. We have a whistle signal. If we require a tug we blow two shorts and a long, which is the reverse of the ordinary towing signal, and the Puget Sound towboat wharf is quite handy to ours.

Q. Did you blow such a signal on this occasion?

A. No, sir.

Q. Captain, I believe you testified that you were from your scheduled time of 2:45 until 3:48, or you rang off engines at 3:50, I believe.

A. They are two minutes out on the time with the wheelhouse, you see. You'll find that discrepancy throughout.

Q. And that's the elapsed time required for the operation, is that correct?

A. That's the elapsed time to finish with engines, but it [379] is not—the total time there is "Finished with engines," but the ship was alongside the wharf for some time, maybe a period of ten minutes, while we operated the cargo doors on the ship's side.

Q. Would you ring off engines before the ship was all fast?

A. No. That's what I'm trying to say. Some of that time was consumed—under the weather con-

(Testimony of John A. Campbell.)

ditions the port cargo doors, which are usually open going alongside, were kept closed. We had to warp the ship into position to open the doors, which takes time.

Q. During your maneuvers off Pier 57, and correct me if I'm wrong, did you testify that during this making fast of the tug that you were heading about southwest more or less into the wind, is that correct?

A. No, it would be southeast.

Q. Southeast? A. Yes, into the wind.

Q. You were heading southeast?

A. Almost into the wind at the time, as I recollect, when he put his line aboard.

Q. When the tug put his line on board?

A. Yes. We had turned around to—that's my nearest recollection.

Q. That you had not yet turned around?

A. We had turned around. [380]

Q. You had turned around? A. Yes.

Q. And were heading southeast?

A. Back to—approaching the wharf again, in position off the wharf before turning in, coming down to a position off Pier 64 where we normally turn in.

Q. At the time you were heading southeast toward what general pier area would that be headed?

A. Well, we were heading down towards the end of the harbor with the Smith Building on the port bow, Smith Tower.

(Testimony of John A. Campbell.)

Q. Would you stop and think a moment about that, Captain? You said southeast.

A. That's the general direction.

Q. Is Smith Cove southeast from Pier 64?

A. No, east. That's east. In an easterly direction.

Q. Isn't it true that Smith Cove is northwest of Pier 64? A. I mean the Smith Tower.

Mr. Morrow: He said the Smith Tower.

Q. (By Mr. Mikkelborg): Oh, I beg your pardon, Captain. The Smith Tower?

A. Yes.

Q. Did you have way on the ship at that time?

A. Yes, a little, very little.

Q. And were you turning at that time? [381]

A. No, as far as I recollect I was going straight ahead.

Q. You were headed southeast for the Smith Tower?

A. Well, in that general direction, down the harbor towards the Smith Tower about three or four cables off the wharf.

Q. And which way did you turn to turn up toward Pier 64, to the left or to the right?

A. To the left.

Q. To the left, so you were headed southeast when turning left? A. That's right.

Q. You had some way on the ship?

A. Very little.

Q. As you turned left, what direction would that bring your heading?

A. That would bring her in a general northeast

(Testimony of John A. Campbell.)

—we use magnetic courses, you see, and I'm figuring these magnetic. If you want them in true I'll have to change them. Do you wish them in true?

Q. I wish just the general direction of the ship, Captain.

A. Well, you see this ship is equipped with magnetic compasses, and we use magnetic courses. Now, the general direction is northeast magnetic, which would be about east-northeast true.

Q. When you were heading southeast and turning to the left, that turn would bring you headed more and more toward [382] the east, would it not?

A. No, it would bring me more and more towards the north.

Q. Before you could head north from a heading of southeast you must necessarily turn some direction; if you were turning to the left I assume it would require you to be headed east, would it not, before you got around to the north?

A. Yes, you would go through east.

Q. Yes. A. Is that what you mean?

Q. Yes. A. Yes.

Q. And when you were headed east——

A. I'm still turning to the north.

Q. Yes, and way was on the ship, is that not right? A. Yes.

Q. And this way on the ship and the turn to the left from southeast to east and back up to north would be taking you closer inshore, is that not right, Captain?

A. I'm proceeding inshore all the time.

(Testimony of John A. Campbell.)

Q. Closing the piers at that time?

A. Yes, that's right.

Q. And did you take any soundings to determine the depth of the water in that area?

A. No, I did not. [383]

Q. Is the Princess Louise fitted with a fathometer or a sounding machine?

A. No, all we have is a hand lead and a deep sea lead.

Q. Did you at any time take any soundings to determine your position off the pier heads, particularly during this turn to the southeast and east as you were closing the shore?

A. No, I did not.

Q. So your recollection as to how far off the piers you were in the vicinity of Piers 57 and 58 and north toward Pier 64 is based solely on your recollection?

A. That is correct.

Q. Without having taken any soundings at the time or recorded any visual bearings, is that correct?

A. That is correct.

Mr. Mikkelborg: No further questions.

Redirect Examination

Q. (By Mr. Morrow): Captain, I have just one question. How long is a cable in terms of miles?

A. One-tenth of a mile, sir.

Q. A cable is one-tenth of a mile?

A. That is correct.

Q. Thank you. [384]

Mr. Morrow: That's all.

(Testimony of John A. Campbell.)

The Court: Is two hundred yards one-tenth of a mile, is that correct?

A. That's correct.

Q. (By Mr. Morrow): That's a nautical mile, six thousand feet, is it, Captain? A. Yes.

The Court: One-tenth of a nautical mile?

Mr. Morrow: 6,080 feet, to be accurate.

The Court: 6,080?

Mr. Morrow: Yes, your Honor.

The Court: That is a nautical mile?

Mr. Morrow: Yes, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Morrow: Mr. Guiney.

The Court: Come forward, Mr. Guiney, and be sworn as a witness.

JOHN ROBERT GUINEY,

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

The Court: We need to have the spelling of your last name, Mr. Guiney. [385]

A. G-u-i-n-e-y.

The Court: G-u-i-n-e-y?

A. Yes, sir.

The Court: The first name?

A. John.

The Court: You may proceed.

(Testimony of John Robert Guiney.)

Direct Examination

Q. (By Mr. Morrow): Please state your full name, Mr. Guiney.

A. John Robert Guiney.

Q. What is your address?

A. 681 Meaford Avenue, Langford, Victoria, B. C.

Q. Will you speak a little louder, Mr. Guiney, so the reporter can get it. What is your present occupation? A. Driver salesman.

Q. Were you employed by the Canadian Pacific in March, 1955? A. Yes.

Q. How long prior to 1955 had you been employed by the Canadian Pacific?

A. About four years.

Q. In what capacity or employment did you serve? A. Seaman.

Q. Were you a seaman aboard the Princess Louise on March [386] 21, 1955?

A. Relief day man.

Q. March 21, 1955? Pardon me? A. No.

Q. What?

The Court: The answer was "No".

Q. (By Mr. Morrow): You were not?

A. Not a seaman, relief day man.

Q. Oh, you were a relief day man, yes. What were your duties as a relief day man?

A. Ship's maintenance and stand by the anchor.

The Court: I think it would help, Counsel, if you would keep your voice raised. Keep your voice

(Testimony of John Robert Guiney.)

up and speak distinctly. You have already noted, have you not, that it is pretty hard to hear one's voice in this room. That means that all of us have to speak with more effort to be sure that we are heard. Speak up.

Q. (By Mr. Morrow): Did your duties include standing by the anchor windlass on approach to Seattle? A. Yes.

Q. Had you on occasions previous to March 21, 1955, engaged in the same duties?

A. Yes.

Q. Can you state what is customary in respect to the handling of the anchor and the anchor windlass on the [387] days where there is a strong south-east wind or gale in the harbor?

A. The anchor would be got ready to be lowered and the fall would be taken off as a safety measure, and the windlass would be put in gear and the anchor would be got ready to walk out.

Q. And what, if any, was the customary length of cable to which the anchor was dropped on such occasions? A. Two cables.

Q. And what is two cables?

A. Two shackles.

Q. Or two shackles. What is two shackles?

A. Fifteen fathoms is a shackle. Thirty fathom.

Q. Now, do you have any recollection in respect to the docking or the maneuvers of the Princess Louise on the occasion of March 21, 1955?

A. Will you repeat that?

Mr. Morrow: Would you read it back?

(Testimony of John Robert Guiney.)

The Court: That will be done.

(The reporter read the last question.)

Q. (By Mr. Morrow): Do you have any recollection of what happened on that day, if anything?

A. Not—no.

Q. The answer is “No”?

A. (Witness nods his head.) [388]

Q. During your service aboard the Princess Louise as substitute leading day man did you ever have any information or knowledge during 1955 of the anchor of the Princess Louise fouling any cable in the Seattle harbor?

A. Not to my knowledge.

Q. When did any information of that kind first come to your attention?

A. About three weeks ago.

Mr. Morrow: You may inquire.

Cross Examination

Q. (By Mr. Mikkelsen): Mr. Guiney, did you hear the Captain's testimony regarding the size and weight of the Princess Louise's anchor?

A. Yes.

Q. Does that agree with your recollection of the size and weight of the anchor on that ship?

A. Yes.

Q. I assume you handled it. A. Yes.

Q. Have you ever had an occasion, Mr. Guiney, where you were able to note or sense or realize that the anchor when out had fetched up on some obstruction? A. No.

(Testimony of John Robert Guiney.)

Mr. Mikkeltorg: No further questions. [389]

Mr. Morrow: That's all.

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Morrow: Call Mr. Hodge.

WILLIAM HODGE,

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Morrow): Please state your full name. A. William Hodge.

Q. How do you spell the last name?

A. H-o-d-g-e.

Q. What is your address?

A. 163 Wildwood Avenue, Victoria, B. C.

Q. Is that W-i-l-d-w-o-o-d? A. Yes, sir.

Q. By whom are you employed?

A. Canadian Pacific Railway Company.

Q. What is your occupation?

A. I'm a master of CPR ships.

Q. How long have you been licensed as a master?

A. Since 1947. [390]

Q. Were you employed aboard the Princess Louise on March 21, 1955? A. Yes, sir.

Q. In what capacity? A. Chief officer.

Q. Pardon?

A. Chief officer, first officer.

(Testimony of William Hodge.)

Q. Chief officer? A. Yes, sir.

Q. As chief officer what were your principal duties?

A. Mostly navigation, sir, handling of cargo, a bit of that, and maintenance of lifeboat equipment, fire fighting equipment.

Q. Yes. In connection with your duties as first officer does it likewise include any other duties that the master might assign to you?

A. Oh, yes, sir.

Q. Do you recall what the weather was on March 21, 1955, during the approach to Seattle?

A. Yes, sir.

Q. What was it?

A. It was blowing a gale of wind from a southerly direction.

Q. Yes. Now you may refer to the log for any information that is necessary. What was the state of the tide?

A. If I remember right, sir, it was about the top of high [391] water.

Q. Now, during your maneuvering and docking at Seattle on March 21, 1955, did you at that time have any information or knowledge that the ship's anchor had struck or fouled a submarine cable?

A. No, sir.

Q. Referring you to the chart, Respondent's Exhibit A-1, I call your attention to a red line and some little circles off the face of the Bell Street Terminal and the Canadian Pacific dock. Do you see those? A. Yes, sir.

(Testimony of William Hodge.)

Q. That line, Mr. Hodge, has been identified as the location of the Seattle-Fort Lawton cable as it existed shortly prior to March 21, 1955. I wish to ask you whether prior to the trial and preparation of this trial you had any information or knowledge that the Seattle-Fort Lawton cable or any other cable laid in that position off the face of those docks?

A. I received that information, I think it was two days later after that. That would be March 23rd.

Q. March 23rd? A. Yes.

Q. And what was that occasion?

A. There was two men, one I believe might have been an Army officer, came to the ship and told me that the Louise [392] had apparently shifted or broken the submarine cable during the docking operations.

Q. Had you any information or knowledge prior to that of any claim of injury to that cable?

A. No, sir.

Q. Now, do you recall at any time seeing a cable ship in that area?

A. There was one there several days later.

Q. That is several days after——

A. March 21st.

Q. March 21st, and where was that cable ship working?

A. Well, sir, as I remember that it was inside our course line approaching the dock and could have been off our own pier or maybe a little towards Pier 66. I didn't take any bearings on it.

(Testimony of William Hodge.)

Q. Was the cable ship at any time working in the area of the marked cable area on the chart which you have before you, being Respondent's Exhibit A-1?

A. Not to my knowledge. I didn't see it.

Mr. Morrow: That's all. You may inquire,—

Q. (By Mr. Morrow): You're familiar with that marked cable area, are you?

A. Yes, sir.

Mr. Morrow: You may inquire. [393]

Cross Examination

Q. (By Mr. Mikkelsen): Mr. Hodge, referring to the cable area which you say you're familiar with, how far west of the shoreline does the marked cable area extend?

A. Out into the water?

Q. Out toward the west.

A. Can I measure it?

Q. Yes.

A. I'm not that familiar with it.

The Court: In measuring it, if you have sharp pointed calipers do not let them stick through the paper.

A. I don't have anything here except a rough measurement.

Q. (By Mr. Mikkelsen): That will be good enough, the way you're measuring it with a pencil, Mr. Hodge.

Mr. Morrow: That can't be too accurate.

A. I would say about 450 yards.

(Testimony of William Hodge.)

Q. (By Mr. Mikkelborg): Yes.

The Court: These are as sharp as a needle. They should not be used on that paper unless you just touch them lightly.

Q. (By Mr. Mikkelborg): Your answer was that the cable area as marked on the chart shows out to the westward some 450 yards, is that correct?

A. Yes, sir.

Q. Now, your observation of the cable ship, was that cable ship observed east or west of the end of the marked cable area?

A. I would say north, sir.

Q. You would say north?

A. Yes, up towards the Seattle Terminal dock.

Q. Well, was it far enough west to be beyond the marked portion of the cable area?

A. Oh, yes, I think so.

Q. Mr. Hodge, your duties included navigating, is that correct? A. Yes, sir.

Q. And what was your station during the large part or the bulk of the time the Princess Louise was making her landing on the day of March 21, 1955?

A. On the first approach—well, I'll start where I—coming up the Seattle harbor I had been on watch. The master relieved me at West Point. I stood by in the wheelhouse, and the master rang down for slow speed on the engines——

Mr. Morrow: Will you talk louder, Mr. Hodge? I can hardly hear you, sir.

A. I went below, and when the master rang

(Testimony of William Hodge.)

slow on the engines I noted that time in the log book and on his [395] orders went down to the windlass room to get the anchor ready, to supervise it.

Q. (By Mr. Mikkelborg): Was that at the commencement of the approach to make the landing?

A. That would approximately have been at Pier 71, the Union Oil dock.

Q. So that would be just at the very beginning of the approach, is that right?

A. Well, you could say that, sir, yes. We were coming up to our mark.

Q. And where did you go at that time?

A. To the windlass room.

Q. To the windlass?

A. To the windlass room.

Q. To the windlass room?

A. Yes, below the forecastle head.

Q. Is that inside the hull of the ship?

A. Yes, sir, that's right.

Q. And where was your next work performed?

A. When I got the anchor down I went up on the forecastle head.

Q. And where did you go next?

A. Then I noticed that we were getting close to our own wharf then and I noticed the master was backing away, so I went to the wheelhouse to see what further orders [396] there were.

Q. And then what?

A. Well, then this towboat Titan came around

(Testimony of William Hodge.)

and the master decided that the best place to use the towboat would be on the starboard quarter with a towline.

Q. So you went back there, is that right?

A. So he ordered me down there to supervise that operation.

Q. Well, who was acting as navigating officer in your stead?

A. Nobody. Once you approach the dock the master is alone except the quartermaster. There's no mates up there.

Q. He was alone at that time?

A. Yes, sir.

Q. Where were you stationed, Mr. Hodge, during the time the ship was headed in a southeasterly direction rounding around to the east and making a turn to the left?

A. On the second approach, sir?

Q. Yes.

A. I was back on what we call the horseshoe deck. That is down in the stern of the ship.

Q. Do you have any idea from your position there how far south the Louise had gotten? Do you have any recollection or estimate on your part?

A. No, sir, I have no recollection of that because from that position I had a very limited view except for more [397] or less you might say right aft, and I was watching the towboat. I didn't watch the land.

Q. And you made no observations or——

A. None at all.

(Testimony of William Hodge.)

Q. Or you did no navigating during this time, is that right?

A. No, nothing. I don't remember taking any notice of the shore at all.

Mr. Mikkelborg: No further questions.

Mr. Morrow: That's all.

(Witness excused.)

Mr. Morrow: Call Mr. Ward.

ARNOLD WARD,

called as a witness in behalf of respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Morrow): Will you please state your full name? A. Arnold Ward.

Q. What is your address?

The Court: W-a-r-d?

A. Yes, W-a-r-d.

The Court: Arnold Ward. [398]

Mr. Morrow: Yes.

A. 5909 Oak Street, Vancouver, B. C.

Q. (By Mr. Morrow): By whom are you employed?

A. Canadian Pacific Railway.

Q. How long have you been employed by the Canadian Pacific?

A. Thirty-two years.

Q. What is your occupation?

A. Deck officer, second mate.

(Testimony of Arnold Ward.)

Q. Do you hold any licenses?

A. Yes, sir.

Q. What licenses do you hold?

A. Master home trade.

The Court: Master of what?

A. Home trade.

The Court: Master of home trade, is that what you said?

A. Home trade, yes, sir.

The Court: I do not quite know about that rank or rating, Mr. Ward. Is it a license that authorizes you to operate a vessel, navigate a vessel and manage the——

A. In what they call home trade, coasting, yes.

The Court: A coasting vessel? A. Yes.

The Court: You may proceed.

Mr. Morrow: Yes.

Q. (By Mr. Morrow): Were you employed aboard the Princess Louise on March 21, 1955?

A. Yes, sir.

Q. In what capacity?

A. Second mate.

Q. Did anything occur during the landing which came to your knowledge in respect to the fouling or the hooking of a submarine cable?

A. No, sir.

Q. When did you first hear about any such thing?

A. I think it was about the next trip down to Seattle about two days later.

Q. I see. When you came down to Seattle two

(Testimony of Arnold Ward.)

days later did you observe any cable ship in the vicinity?

A. No. I think it was about four days later that——

Q. About four days later?

A. The second trip down.

Q. The second trip down. Where was the cable ship working when you observed it?

A. Off the end of the Canadian Pacific dock.

Q. Was the cable ship working in the marked cable area that is marked on the chart?

A. No, sir. [400]

Q. What were your duties at the time of landing?

A. Of the landing?

Q. Yes.

A. Well, on that particular day I wasn't on watch, but on account of the weather and that I went up to the wheelhouse to see if I could be of any assistance.

Q. Did you notice the weather?

A. Yes, sir.

Q. What was the weather?

A. A southeast gale.

Mr. Morrow: You may inquire.

Cross Examination

Q. (By Mr. Mikkeltorg): Did you remain in the wheelhouse during the entire docking procedure, Mr. Ward?

A. No. I was there for the first approach in the

(Testimony of Arnold Ward.)

wheelhouse and then on the second approach when Mr. Hodge, the first mate, went down to the tow-boat the master told me to go down in the fore-castle head.

Q. Did you do any work with respect to establishing the ship's position at any given time during the approach? A. No, sir.

Mr. Mikkeltborg: No further questions.

Mr. Morrow: No further questions. [401]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Morrow: I believe the respondent rests. I would like to check the exhibits first, your Honor.

The Court: You may. Let Counsel see the exhibits.

Mr. Morrow: Not to check them, but to see which ones, if any, haven't been admitted that perhaps should have been.

The Court: My information is that all of the respondent's exhibits offered have been admitted except A-2, which I have denominated as another, meaning the second, Coast and Geodetic Survey Chart No. 6449.

Mr. Morrow: A-2 may be withdrawn, your Honor.

The Court: It is now withdrawn and will be returned to Counsel who produced it.

Mr. Morrow: The respondent rests, your Honor, and I would like to have Mr. Guiney particularly

excused from any further attendance and perhaps otherwise.

The Court: Is there any further testimony?

Mr. Mikkelborg: No, your Honor.

The Court: Does the libelant rest also?

(Brief pause.)

Mr. Mikkelborg: I would call one witness on [402] rebuttal.

The Court: Very well. Mr. Guiney is now excused and may retire if he wishes. He will not have to appear in this case further. Call that witness in rebuttal.

Mr. Mikkelborg: Call Captain Bowen.

JOHN H. BOWEN,

recalled as a witness in behalf of libelant, being previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

Q. (By Mr. Mikkelborg): Captain Bowen, did you hear the testimony of the officers of the Princess Louise with respect to their observation of a cable repair ship engaged or at least observed to be off Pier 64, the Canadian Pacific Railway dock?

A. Yes, sir.

Q. Were you as captain of the Lenoir engaged in repair work on the 21st, 22nd and 23rd — or rather the 23rd through the 29th of March, 1955?

A. Yes.

Q. Was there any other cable repair ship en-

(Testimony of John H. Bowen.)

gaged in the repair of that cable other than the Lenoir at that time? A. No. [403]

Q. Would you describe the position of the Lenoir during her cable work with particular relation to the boundary of the cable area shown on Respondent's Exhibit A-1, the Coast and Geodetic Chart 6449, and that position with respect to the CPR dock, Pier 64?

A. Did you say to describe the position?

Q. Yes, would you describe the position as you worked the Lenoir with relation to the cable area and the Pier 64, CPR dock?

A. During periods that we might have been grappling for cable we could have been well north of that position. As I recall, we steamed north of where the cable would have been and dragged south toward it.

Q. Captain, is there any other way to recover a cable than to move north or south, that is at right angles to its length, in order to hook it with a grapnel? A. No, sir.

Q. Then if the Lenoir was seen north of the cable area and westward off Pier 64, does that have any necessary relation to the position of the cable?

A. Not necessarily.

Q. Would you explain how the Lenoir might have been north of the cable area and off Pier 64?

A. We could have steamed north with the vessel prior to grappling for the cable, in which event we would have [404] lowered the grapnel to the bottom

(Testimony of John H. Bowen.)

and steamed south at right angles to the course or southwest at right angles to the course.

Q. Think about your repair, Captain Bowen. You say you could have. Advise whether that is what you did or not, if you can remember.

A. We did do that, yes, on two different occasions that I recall.

Q. During this repair period from the 23rd through the 29th of March, 1955?

A. Yes.

The Court: Mr. Reporter, will you please read the last three questions and answers.

(The reporter did as directed.)

Mr. Mikkelsen: No further questions.

Mr. Morrow: I have no questions.

The Court: You may step down.

(Witness excused.)

Mr. Morrow: May it please the Court, I would like to reopen my case for one thing that I overlooked. It doesn't involve recalling a witness.

The Court: It does not, you say?

Mr. Morrow: No, it does not.

The Court: State what it is you wish to do.

Mr. Morrow: Part of my case in my opening [405] statement was the matter of evidence pertaining to the feasibility and practicability of marking the cable area in order that the cable extending in front of the Canadian Pacific dock and the Bell Street Terminal would not be fouled, and I have here a revised chart and it shows the revised mark-

ings of the cable area in question. I would like to have it marked and admitted in evidence.

The Court: Any objection?

Mr. Mikkelborg: Yes, if the Court please. This chart I believe Counsel has reference to is a chart printed March 17, 1958. There are many conditions on this chart which have changed since March 21st to March 29th of 1955, lights, cable areas, many things are different. It appears to the libelant that it is not material on any question at issue in this case. It may be of historical interest at this date, but it has no bearing on any issues as they existed in March of 1955.

The Court: March 17, 1958?

Mr. Mikkelborg: This chart bears printing on the lower left-hand corner indicating issue of 3/17/58.

Mr. Morrow: It's a Chart 6449, your Honor, and it's offered for the very limited purpose of showing the practicability and feasibility of marking the cable area.

The Court: The objection is sustained, but [406] permission is granted for you to open your case for the purpose of making the offer of that exhibit.

Mr. Morrow: Yes.

The Court: However, as the Court has stated, the objection is sustained to the offer.

Mr. Morrow: That concludes our case, your Honor.

The Court: Very well. Does the libelant rest?

Mr. Mikkelborg: The libelant rests, your Honor.

The Court: Does each side rest?

Mr. Morrow: Yes, your Honor.

Mr. Mikkelborg: Each side rests, your Honor.

The Court: I think I would rather hear this argument tomorrow morning, if Counsel can arrange to make it then.

Mr. Mikkelborg: That's agreeable, your Honor.

The Court: How long would libelant like to argue?

Mr. Mikkelborg: The libelant would appreciate having thirty minutes.

The Court: Is that agreeable to you?

Mr. Morrow: That's agreeable, your Honor.

The Court: Thirty minutes on each side. It [407] will begin at 10:00 o'clock. I would like to have a chance to finally study these exhibits, but I want to do it at a time, if I can do it, when it is not interfering with Counsel's use of them. Have you any such attitude that there is only a certain time that you can use them? I would like to know what that is, if you have it.

Mr. Mikkelborg: As far as the libelant is concerned I believe that all exhibits can be available to the Court from this time on.

The Court: Will you need them in the morning before 10:00 o'clock?

Mr. Morrow: No, I will not need them until shortly before court in order that I might perhaps arrange them or——

The Court: I expect they can be made available in the courtroom shortly before 10:00 o'clock.

Mr. Morrow: Yes. I think both parties have

duplicates of practically all the exhibits, your Honor.

The Court: The Court would like the exhibits left in chambers this evening, Mr. Clerk.

The Clerk: Yes, your Honor.

The Court: The witnesses and parties are excused in this case and may go on about their own business if that is their wish. Counsel in the case [408] are excused until tomorrow morning at 10:00 o'clock and all may retire now if they wish.

(At 4:25 o'clock p.m. a recess herein was taken until 10:00 o'clock a.m. Friday, August 22, 1958.)

Friday, August 22, 1958, 10:00 o'clock a.m.

(All parties present as before.)

The Court: I will hear Counsel from their present stations, and each side may use thirty minutes and the libelant's side may divide that time between his opening and closing arguments according to his own wishes. I will now hear the libelant's opening argument.

(Thereupon, oral argument was presented to the Court by Mr. Mikkeltorg in behalf of libelant and by Mr. Morrow in behalf of respondent.)

The Court: From a preponderance of the evidence in this case the Court finds, concludes and decides as follows:

That the cable in question was lawfully installed

and maintained where it was at the time of [409] the collision with it and the breaking of it as disclosed by the evidence in this case.

That the location of the cable and the cable area were lawfully marked, and, in keeping with the requirements of due and ordinary care, were actually marked and charted, of which facts the master in personal charge of the vessel's maneuvers was and is in law charged with notice, and that the master and crew members assisting him in such maneuvers either knew or by the exercise of due and ordinary seamanship and care should have known of the presence of such cable and cable area, but failed to do so.

That the location and maintenance of the cable at the place and time of the accident were in all respects lawful and were in such careful and lawful condition at the time of this accident.

That those in charge of the vessel did carelessly and negligently drop her anchor upon or too close to the cable to avoid contacting the cable, and as a proximate result of such carelessness and negligence such anchor did, while the *Princess Louise* was engaged in such maneuvers, drag against and break and damage the cable, for all of which respondent is liable.

That as a proximate result of such damage and breaking of the cable the libelant has sustained the [410] following total direct damages, namely, the total sum of \$6,954.23, which constitutes a reasonable sum needed to reasonably reimburse the libelant for any and all damages directly and proximately resulting from the negligent acts and omis-

sions of the respondent and those in charge of the maneuvers of the Princess Louise at the time of the occurrence of this accident.

That no other items or amounts of claimed damages will be approved or allowed by the Court.

Is there any other issue of fact or law which either Counsel regards as one or such as must be disposed of before this case can be finally and completely adjudged and determined?

Mr. Morrow: I think of nothing, your Honor.

Mr. Mikkelborg: None, your Honor.

(There was a discussion as to time of presenting final written order.)

The Court: The judgment will also include taxable costs in favor of the libelant against the respondent.

Counsel are excused until August 28th at 10:00 o'clock in the forenoon, at which time the Court will settle and enter findings, conclusions and decree. Are there any other matters to come before the Court at this time? [411]

Mr. Mikkelborg: If the Court please, would it be possible to consider on stipulation of Counsel the substitution of copies for certain of these government documents that are required by their custodians?

The Court: If Counsel approve it, Counsel on both sides, the Court will approve the substitution of true copies for any originals on file herein and will return the originals to Counsel who produced the particular exhibit or exhibits sought to be so replaced.

Mr. Mikkelborg: Is that agreeable?

Mr. Morrow: Well, I don't know what you have in mind. I am——

The Court: The Court's statement takes care of it. I said if Counsel approve it. You may wait to see if you can approve it. If you do not, then the Court will not.

Mr. Morrow: I can't think of any exhibit in evidence which is an original which would be required by the government.

The Court: There are certain exhibits as to which I am sure you cannot accomplish that desired result. I am certain that as to certain exhibits in the record you cannot possibly accomplish that, namely, the log books and of course these charts, these C. and G. S. charts. That Permit exhibit is already a copy, is it [412] not?

Mr. Mikkelborg: Yes.

The Court: What the Court said takes care of it. If Counsel agree upon it, the Court will approve it.

Court is now recessed.

(Thereupon, at 11:15 o'clock a.m., an adjournment herein was taken.)

Monday, September 15, 1958, 10:55 o'clock a.m.

(All parties present as before.)

(Findings of Fact, Conclusions of Law and Decree were entered.)

The Court: Now, Mr. Morrow.

Mr. Morrow: May it please the Court, I would

like to move for a nunc pro tunc order permitting the marking of one exhibit which was not marked.

The Court: Have you any objection to that request to have marked as one of the respondent's exhibits that one mentioned just now by Mr. Morrow and let the Court do that nunc pro tunc? Just put on the mark that you wish and the Court will rule upon the request. [413]

Mr. Mikkelborg: There is no objection to marking it, if it was overlooked in the trial.

The Court: Why do you say "if"? Do you have objection or do you not have objection?

Mr. Mikkelborg: I have no objection to marking this if I may be advised of the number that it is to be given and may ascertain that it has not already been in.

Mr. Morrow: I assure you that it has not been already in.

The Court: Are you sure that there is no other chart like that?

Mr. Morrow: No, your Honor.

The Court: Very well. Is that sufficient for you, Mr. Mikkelborg?

Mr. Mikkelborg: There are a number of charts already in.

The Court: Counsel will have to ascertain the facts and let the Court know what their attitude is.

Mr. Mikkelborg: I'll have no objection, your Honor.

The Court: The request as made by respondent's Counsel respecting this exhibit last mentioned by him is granted and it is so ordered. I ask Counsel to proceed to the finish of this detail with the clerk in [414] accordance with the Court's order.

The Clerk: It will be Respondent's A-11.

(Coast and Geodetic Survey Chart No. 6446 was marked Respondent's Exhibit No. A-11 for identification.)

The Court: It is not admitted in evidence, it is merely marked for identification.

Mr. Mikkelborg: May the record show that it was offered and was excluded, the Court having sustained the libelant's objection to this exhibit?

The Court: Do you know by what name or identifying mark it was mentioned when the Court so ruled?

Mr. Mikkelborg: It was specified by the name Coast and Geodetic Survey Harbor Chart No. 6446 of the March, 1958 issue.

The Court: Counsel in this case are excused.

(Thereupon, an adjournment was taken.)

[Endorsed]: Filed January 14, 1959.

[Endorsed]: No. 16334. United States Court of Appeals for the Ninth Circuit. Canadian Pacific Railway Co., a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: January 19, 1959.

Docketed: January 23, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 16334

CANADIAN PACIFIC RAILROAD CO., a
corporation, as owner and operator of
the SS Princess Louise,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT ADOPTING APPELLANT'S
STATEMENT OF POINTS FILED IN
THE UNITED STATES DISTRICT
COURT

Appellant, Canadian Pacific Railway Company,
hereby adopts by reference Document #32 as the
Statement of Points upon which appellant will rely
in this court.

BOGLE, BOGLE & GATES,
/s/ THOMAS L. MORROW,
Proctors for Appellant, Canadian
Pacific Railway Company.

[Endorsed]: Filed January 23, 1959. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLEE WILL RELY

1. The trial Court erroneously failed to allow
appellee damages based on the daily operational

costs of the appellee's cable repair ship for the period during which said ship was exclusively engaged in the cable repair occasioned by the negligent damage and breaking of the Seattle-Fort Lawton submarine cable by appellant.

2. The trial Court erroneously excluded evidence of the daily operational cost of operating and maintaining appellee's cable repair ship.

3. The trial Court erroneously excluded libellant's Exhibit No. 3 being an official government record of the direct costs made and kept in the regular course of business by appellee's chief cost accountant.

4. The trial Court erroneously concluded that the only damage recoverable by the appellee was the sum of \$6,954.23 incurred for the cable repair work performed by appellee.

5. The trial Court erroneously excluded evidence of the per diem charter value of the cable repair ship as evidence of recoverable damages.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ JACOB A. MIKKELBORG,
Assistant United States
Attorney.

Affidavit of Mailing Attached.

[Endorsed]: Filed January 30, 1959. Paul P. O'Brien, Clerk.

**United States Court of Appeals
For the Ninth Circuit**

CANADIAN PACIFIC RAILWAY Co., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S OPENING BRIEF

BOGLE, BOGLE & GATES
THOMAS L. MORROW
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.



FILED

MAY 27 1959

PAUL F. WOODLEY, CLERK

United States Court of Appeals
For the Ninth Circuit

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United States Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY Co., a corporation,	<i>Appellant,</i>	} No. 16334
vs.		
UNITED STATES OF AMERICA,	<i>Appellee.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This action was instituted by a libel in personam in Admiralty in the District Court by the United States of America, libelant, against the Canadian Pacific Railway Co., a corporation, as owner and operator of the SS PRINCESS LOUISE, respondent (R. 3). The libel alleged a cause of collision, civil and maritime, arising out of damages to the appellee's Alaska Communications System submarine cable lying beneath the surface of the waters of Puget Sound, alleging fault on the part of the SS PRINCESS LOUISE in causing or permitting the vessel's anchor to collide with and break the said cable while attempting to dock at Pier 64, Seattle, Washington, on March 21, 1955 (R. 4). The answer of appellant alleged that if the anchor of the SS PRINCESS LOUISE

struck and damaged the said Alaska Communications System submarine cable while attempting to dock, such damage was caused without fault and neglect on the part of the respondent, the SS PRINCESS LOUISE, her officers and crew (R. 7). The libel alleged and the answer admitted the admiralty and maritime jurisdiction of the United States and of the District Court (R. 5, 7).

Findings of Fact and Conclusions of Law and a final decision were entered in favor of appellee and against appellant by the District Court (R. 13, 19).

The United States District Court had jurisdiction by virtue of 28 U.S.C.A. §133 and 46 U.S.C.A. §740. See also *All America Cables & Radio v. The Dieppe*, 93 F. Supp. 923 (S.D. N.Y. 1950).

Following entry of the final decision, an appeal was taken by respondent from the decree (R. 20), which by virtue of 28 U.S.C.A. §1291 gives this Court of Appeals jurisdiction to review the decree.

STATEMENT OF CASE

This appeal presents questions (1) whether the trial court clearly erred in finding and concluding that the appellant was liable for damage to a submarine cable owned by appellee, (2) whether the court erred in excluding from evidence respondent's Exhibit A-11, being a U.S.C. & G.S. Chart No. 6446 issued by appellee subsequent to the loss, and (3) whether the trial court erred in admitting and considering hearsay evidence on the question of damages and in finding and concluding that appellee had sustained its burden of proving damages.

The principal question on the issue of liability hinges on the issue whether the appellee's submarine cable on March 21, 1955, was struck by the anchor of the PRINCESS LOUISE within the boundary of the *marked* cable area *as marked* on mariners' charts in general circulation on that date. The trial court found against appellant on that issue (R. 15).

There is no indication that the trial court took into consideration the documentary and oral evidence conclusively showing that appellee's A.C.S. submarine cable was replaced and relocated following a 1953 casualty to a position outside and beyond the marked and posted cable area appearing on mariners' charts. Where the cable was located on March 21, 1955, is determined by its relocation in 1953. Whether the PRINCESS LOUISE dropped and dragged her anchor through a *marked or known cable area* so as to come in contact with and break the A.C.S. submarine cable lying on the bottom is dependent upon the whereabouts of the cable and whether it was in a *marked* cable area.

The appellee owns and maintains a submarine cable in Puget Sound between Pier 57, Seattle, and Fort Lawton, Washington, on the bottom and beneath the surface of Puget Sound, known as the Alaska Communication System submarine cable (Findings I, R. 14). The cable was located and installed in accordance with a War Department Permit dated 16th June, 1949 (Libellant's Ex. 5, Findings II, R. 4). The cable as authorized extended along the south side of Pier 57 and thence on a bearing of $282^{\circ} 49'$ (in the westerly direction from Pier 57). The location appears on a diagram attached

to the War Department Permit (Ex. 5, sheet 3). The submarine cable *as authorized* was partly within a marked cable area shown on the mariners' charts on March 21, 1955 (Findings III). Even so the A.C.S. submarine cable *as authorized extended westerly* from Pier 57 out *beyond the marked cable area* as illustrated by Respondent's Exhibit A-1, the same being marked with a bearing $282^{\circ} 49'$ as marked by the Master (R. 284, 285).

The submarine cable *as authorized* was not in the authorized position on March 21, 1955. It was changed in February, 1953, following extensive damage and repairs and was relocated or replaced as shown on the last page of the 1953 Deck Cable Report on respondent's Exhibit A-5. The relocated position of the submarine cable is also shown in red ink marks on the mariners' chart as marked by the Master of the cable ship. The cable extends outside of the marked cable area on the chart (Respondent's Exhibit A-1, R. 287). The red markings of the submarine cable on respondent's Exhibit A-1 as plotted by the Master following the February, 1953, change, shows "a northerly turn or bend of the cable across the face of Pier 64" (R. 287). Pier 64 is, of course, the C.P.R. dock customarily used by Canadian Pacific Company's vessels. Following the March, 1955, casualty, strangely, the A.C.S. submarine cable was *replaced or relocated* to its approximate *authorized position*. See Diagram, last page of 1955 Deck Cable Report, being respondent's Exhibit A-4. The cable area now appears properly marked on mariners' charts. The *marked* cable area was subsequent to the 1955 damage enlarged to include the area of the A.C.S.

submarine cable as it turns and goes northerly, *showing the jog to the north*. This is illustrated by the cable area shown on Respondent's Exhibit A-11 issued in 1958, being U.S. Coast & Geodetic Survey Chart No. 6446 offered but refused in evidence (R. 379, 386).

There was on March 21, 1955, a sign posted on the seawall between Pier 56 and Pier 57, Seattle, Washington, warning of the cable area and against anchoring (R. 14, 104, 105) and known to the Master of the PRINCESS LOUISE (R. 351, 352). No sign appears to have been posted warning of a submarine cable off, say, Pier 58 or Pier 64 past which the cable extends in its reach to the north under water on the bottom.

The court found that the PRINCESS LOUISE, a cargo and passenger vessel of 320 feet in length and owned by appellant, was on March 21, 1955, between the hour of 3:00 p.m. and 4:00 p.m. engaged in docking maneuvers in Seattle harbor (Findings IV, R. 15); that those in charge of her did negligently drop and use her anchor in such close proximity to the cable area as to avoid contact with A.C.S. submarine cable on the bottom (Findings VI, R. 15); that the anchor of the PRINCESS LOUISE was dropped and dragged while the ship was maneuvering in a southeasterly 35-mile wind between 3:00 p.m. and 4:00 p.m. on March 21, 1955; that the anchor "did come into contact with and damage said submarine cable *within the charted boundaries* of said cable area and break said submarine cable (Findings VI, VII, R. 15) resulting in direct damage of \$6,954.23 for repairs to the cable (Findings XII, R. 16).

The court further found negligence on the part of

those in charge of the PRINCESS LOUISE in failing to accurately observe and maintain her position clear of the charted, posted and known cable area while dragging her anchor to assist in controlling her maneuvers (Findings VIII, R. 16), and such failure was the proximate cause of the damage to the cable by the PRINCESS LOUISE (Findings IX, R. 16); that the A.C.S. submarine cable was in use prior to 3:00 p.m. on March 21, 1955, and found inoperative at 4:00 p.m. on said date, and appellee was not at fault and did not contribute to damage (Findings XIV, R. 17). What are the facts as to the location of the cable and whether the cable was within the boundaries of a marked area?

The position of the break of the A.C.S. submarine cable in March, 1955, was established by the cable ship LENOIR at latitude $47^{\circ} 36' 29''$ N., longitude $12^{\circ} 21' 8''$ W. (R. 238, 288). Thirty-four hundred and some odd feet from shore the broken end of the A.C.S. submarine cable was picked up (R. 238, 298). The position *was north of the marked cable area noted on Respondent's Exhibit A1 and in the vicinity of the A.C.S. submarine cable as replaced and relocated in 1953*. See the red ink line and tiny circles extending beyond the marked cable area on respondent's Exhibit A-1 (R. 287). The position of the break was plotted by the Master on Respondent's Exhibit A-1 and identified by a "small blue circle designated by a blue spear" and the label "Seattle broken end" (R. 289). The Master of the cable ship said, as we said before, it is "*beyond the western extremities of 'the cable area marked on the chart'*" (Respondent's Exhibit A-1). The position was identified by the Master of the cable ship as being perpendicular

or southwest of Pier 66, the Bell Street Terminal (R. 292, 293). He said it was 420 yards from the western extremity "of the cable area" (R. 293). Actually, the position where the cable broke is 500 yards beyond the cable area (Respondent's Exhibit A-1). The depth of water at the position of the break was 30 fathoms, or 180 feet (R. 306). The position of the cable ship at the time the broken end of the cable was brought aboard was "accurately" established by a competent navigating officer (R. 313). The position as established by the navigating officer of the cable ship *established the position in which the cable was hooked as the closest measurement to that position which could be obtained*. The Master of the cable ship testified:

"Q. Now, in your experience, Captain, in the repair of cable and the laying of cables does the position in which the broken end was logged aboard have any direct and necessary relation to the position in which the cable was hooked or contacted by any dragging object?

A. I would say yes, it's the closest measurement to that position we could obtain." (R. 306, 307)

The position of the break in the A.C.S. submarine cable as illustrated by Respondent's Exhibit A-1, so marked with a blue circle, is a distance of 75 yards south of the position in which the cable was replaced in 1953. The A.C.S. submarine cable could have been moved from its 1953 and March 21, 1955, position, a distance of 75 yards to the south, *by a ship backing* and dragging its anchor on the bottom (R. 302). From a physical examination of the A.C.S. submarine cable after the break, the Master of the cable ship concluded:

“that a ship’s anchor had probably hooked the cable and had dragged it along a distance and then broken the cable.” He testified that the outer jute was torn off the cable for a distance of 500 *feet* from the broken end and that the steel armors were scored badly for a distance of 100 feet from the end (R. 241, 255).

The location of the cable was also established by the place the cable was picked up by the cable ship at the Fort Lawton end. The Fort Lawton end of the submarine cable was picked up in a position Latitude 47° 36’ 35” N., Longitude 122° 21’ 19” W., which position appears on the chart (Respondent’s Exhibit A-1, R.293, 294, 295, 296, 297), being much in the same location as established in 1953 in the Deck Cable Report of the cable ship LENOIR and Pilot House Log (Respondent’s Exhibits A-5, A-6). Compare the 1953 location in a red line and tiny red circles with the black circle and position indicated by the Master of the cable ship “picked up cable extending from Fort Lawton” plotted on Respondent’s Exhibit A-1 (R. 296).

It is appellant’s contention that the documentary evidence outlined above clearly makes erroneous the court’s finding on the issue of whether the PRINCESS LOUISE struck and dragged the cable *within the boundaries* of a *marked* and known cable area. It also refutes the story of a Col. Rogers, reviewed as follows:

Col. George F. Rogers was Executive Officer, Alaska Communication System, at Seattle, in March, 1955. From the Federal Office Building on First and Marion he observed that the PRINCESS LOUISE was having difficulties in maneuvering into a berth at the C.P.R. dock.

This was on March 21, 1955, at about 3:00 o'clock p.m. (R. 36, 37, 39). He testified the PRINCESS LOUISE "backed down towards our cable area and she had an anchor dragging all that time. That's the end of what I observed" (R. 39). He observed her two or three ship lengths off Pier 57 (650 feet or 960 feet) which he estimated at 600 feet (R. 41). Her anchor was stretched toward the shore as the PRINCESS LOUISE backed (R. 43) and she backed into the cable area and had her anchor dragging (R. 49, 50, 52). When he *first observed* the PRINCESS LOUISE she was "down next to her own dock, *then she backed* and swung over our area" (R. 51). When he saw her back down and her anchor dragging, he concluded there was a possibility of trouble with the Seattle-Fort Lawton cable (R. 52). She *backed generally towards West Seattle*, which would be *southwest* (R. 51), "in a westerly direction" (R. 56). It is to be observed from Respondent's Exhibit A-1 and A-11 that the PRINCESS LOUISE backing in a southwesterly direction would not move into the marked cable area which area is to the southeast of the C.P.R. dock, Pier 64. The position of the break is *southwest* not southeast of the C.P.R. dock, Pier 64 (Respondent's Exhibit A-1). Col. Rogers stated "I don't pay any attention to charts." He didn't know how far out from seawall at the foot of University Street the marked area goes. He did not know the exact location of the Fort Lawton cable (R. 54). He knew "the cable runs down alongside the pier (Pier 57) and swings out towards Fort Lawton (north)" (R. 55). When he referred to the cable area, Col. Rogers was referring to "the area out off the pier (Pier 57) that our cable runs in . . . there's an area off of the pier

that our cable runs through" (R. 55). He placed the PRINCESS LOUISE two or three ship lengths off Pier 57 (R. 57), which if directly off the face of the pier would place the PRINCESS LOUISE southeast of the C.P.R. dock, Pier 64, instead of southwest or towards West Seattle in which direction he testified she backed (R. 51). If the PRINCESS LOUISE backed southwest two or there ship lengths from Pier 64, as testified to by the witness, she could not go over the marked cable area, particularly while making leeway (north) in a southeast gale, which she did (R. 327).

On the issue of negligence in navigation the appellee produced Capt. Albert S. Howell. He was a master mariner and pilot, retired, and not an eye witness. He qualified as an expert on the docking of ships (R. 256). He was of the opinion that it would have been proper to make a landing of the SS PRINCESS LOUISE on the face of the dock, run a headline around the corner of the dock and break around the corner (R. 261, 263). He would "never get upwind on the dock that I was going to dock at" (R. 261), and he would "never get downwindward of the dock where you are going in" (R. 262), which seems contradictory. He would not approach the dock from the upwind side of the dock or from the south or southeast or southwest, but "it would be very difficult to handle the ship that way. I wouldn't be able to do it myself. I never get in that position because I couldn't handle the ship. Coming into the dock you are talking about you're making a port landing" (R. 262, 263). He "had no complaint to make. They were doing the docking, not me" (R. 264). *Nowhere in Captain Howell's testimony did he directly testify that he*

considered it improper or unseamanlike to dock the ship by dropping an anchor to go in between Piers 64 and 63 as testified to by Captain Campbell of the SS PRINCESS LOUISE. Captain Campbell testified that it was not feasible to dock the PRINCESS LOUISE by laying her port side along the Canadian Pacific Dock and putting a line on the dock and warping the vessel around the dock in position because of the flaring bow and the buildings close to the corner of the wharf; *that this would be hard to do without inflicting damage to the dock* (R. 323). On the other hand, he had occasions to dock the PRINCESS LOUISE in the face of a strong south-east wind frequently during the winter time and the PRINCESS LOUISE was docked in the usual and customary manner on this occasion "with the aid of the starboard anchor" (R. 322).

On the issue of whether it was the anchor of the PRINCESS LOUISE that caused the cable damage, the appellee sought to show that the cable broke between 3:00 and 4:00 p.m. on March 21, 1955, while the PRINCESS LOUISE was in the vicinity of the C.P.R. Dock, Pier 64, and by showing no other vessel was in the vicinity during that period. Admittedly, no other vessel was in the vicinity between 3:00 p.m. and 4:00 p.m. on March 21, 1955. Evidence on the issue of whether the cable broke during the period in question follows.

Neither the Master nor crew of the PRINCESS LOUISE knew or had any information of her anchor having fouled a submarine cable on the March 21, 1955, trip (R. 324, 364, 366, 373). The Master first heard about such a claim three weeks later (R. 324) and her chief officer

and second mate not until two days after the alleged occurrence (R. 367, 373).

The appellee offered evidence to show "the exact time of the break" (R. 72). This consisted of the A.C.S. Station Log of Kodiak, Alaska, Exhibit 1, identified and explained by Archie Zehe, M/Sgt., U.S. Army, Alaska Communication Station, Kodiak, Alaska, *who was in Kodiak on March 21, 1955*, not at Fort Lawton or Seattle (R. 63, 64, 65).

M/Sgt. Zehe testified that the service from Kodiak to A.C.S., Seattle, was in good operation on March 21, 1955, at 1:00 p.m., 2:00 p.m. and 3:00 p.m. (R. 89). At 3:00 p.m. the service was released to Adak for Adak to work (R. 90, 92).

Speculating that "line trouble" meant the cable between Seattle and Fort Lawton, the record only shows that it was out between 4:05 p.m. and 4:20 p.m. on March 21, 1955 (R. 93). No official word was received by the cable ship *LENOIR* that there was a fault in the Seattle-Fort Lawton cable until March 23, 1955, as appears by her log entry at 10:50 a.m. on the 23rd (Respondent's Exhibit A-3), though her Master received unofficial word "probably the day before" (R. 234).

The mariners' charts in use in March, 1955, marked the boundaries of cable area and also indicated the depth of water to bottom. The appellee produced William M. Martin, supervisory cartographer in charge of the employees in the office, relative to the plotting of hydrographic surveys on charts for the United States Coast and Geodetic Survey office (R. 128, 129). Par-

ticularly, his work related to plotting depths of water lying off coastal waters (R. 130).

In reference to the cable area marked on the chart (Exhibit A-1), Mr. Martin testified the two red lines marked the boundary of the cable area, the northerly line of which extends out from the south side of Pier 58 (the cables are between Piers 56 and 57) (R. 142). The distance from the sea wall to the westerly end of the red line marking the northerly boundary is 580 yards from the sea wall. The distance along the same northerly boundary line from the pierhead of Pier 58 is 420 yards (R. 142). The distance from the most westerly tip of Pier 57 to westerly boundary of the marked cable area is 420 yards (R. 146).

Thus a ship to be within the marked cable area would have to be within 420 yards of Piers 57 and 59 (Langworthy testified that the PRINCESS LOUISE was about 500 yards from either Pier 57 or 59 (R. 127) and Captain Campbell, who was in the best position to know, testified four and one-half cables, which would be 900 yards (R. 331).

Mr. Martin testified that in order to determine the actual depth of water shown on the chart at any particular stage of the tide, you must add the stage of the tide (R. 141). At 3:00 p.m. on March 21, 1955, the tide was 8.7 feet and at 4:00 p.m. the tide was 9.3 feet (R. 141). For example, a 180-foot sounding on the chart at a 9.3-foot stage of the tide would have an actual depth of water of 189.3 feet (R. 141).

The story of the PRINCESS LOUISE and of her proper navigation and movements can best be told by the stories

of her Master and a disinterested witness called by appellee as their stories coincide in every practical aspect.

The SS PRINCESS LOUISE, John A. Campbell, Master, was scheduled to arrive at the Canadian Pacific dock, Seattle, Pier 64, on March 21, 1955, at 2:45 p.m. (R. 324). Having encountered difficulties in docking in the face of a southeast gale, wind force of 40 miles per hour, she docked instead at 3:48 p.m. (R. 323, 324).

The PRINCESS LOUISE approaching Seattle Harbor on a southerly course passed Four Mile Rock at 2:37 p.m., according to her deck log (Respondent's Exhibit A-7). Captain Burt Langworthy, in charge of Harbor Patrol Boat No. 7, observed her coming into the harbor at 3:07 p.m. (R. 112, 113). Langworthy was a harbor man employed by the City of Seattle (R. 98) and observed the PRINCESS LOUISE through field glasses on her scheduled run May 21, 1955 (R. 99, 100). He watched her until about 3:30 p.m. (R. 101), his observations being from 3:07 to 3:30 p.m. for a period of 23 minutes (R. 112). He testified that "she came on her normal course into the harbor and towards the pier (C.P.R. Dock, Pier 64), with the exception of the last portion, and she came farther south than usual" (R. 101) "due to the force of the wind" (R. 101), which he stated was a southerly gale (R. 99). He further stated that during the southernmost portion of her approach "the C.P.R. boat could have been as far as Pier 59" (R. 102), and that she turned left or east into Pier 64 (R. 103).

Captain Campbell testified that upon entering the Seattle harbor in a southeast gale of wind of about 40 miles per hour (R. 323, 324), he approached the C.P.R.

dock by entering in line with and between Pier 63 and Pier 64 (see Respondent's Exhibits A-1 and A-9); that the starboard anchor was let out fifteen fathoms (90 feet) and dropped another fifteen fathoms to thirty fathoms (180 feet) when the PRINCESS LOUISE was about 900 feet from the south corner of Pier 63 (R. 325). This approach was "very similar" to previous occasions on which an attempted landing had been made in a southeast gale (R. 326). The PRINCESS LOUISE normally backs to port which she at first did on this occasion, but in the then existing conditions of wind influence, blowing the bow down, the stern went into the wind (R. 326). The starboard anchor was still out, thirty fathoms in the water (R. 329). After backing out in the clear, the engines were put on ahead on a port helm, and the PRINCESS LOUISE steamed around on a left rudder to get back into position to attempt another landing in a left circling motion (R. 327). On the second approach she was assisted by the tug TITAN, secured to the stern or starboard quarter of the PRINCESS LOUISE with a towline, to counteract the effect of the wind on the stern. The PRINCESS LOUISE made her landing on an approach coming in on a line between the C.P.R. dock and Pier 63 as before (R. 328, 329). The Master had left the starboard anchor out in thirty fathoms of water as a proper precaution *according to the depth of water shown on the chart* and the position of the vessel. It would take bottom at the nearest point where the water was 180 feet deep (R. 330, 331). As the ship approached the wharf on the second approach, the port anchor was let go, right between the wharves at the extreme seaward end (R. 331). The PRINCESS LOUISE

remained at the C.P.R. dock an hour and twenty-one minutes before departure at 5:09 p.m. on March 21, 1955 (R. 331). There is no evidence and no claim that the PRINCESS LOUISE was notified during this period of having fouled the submarine cable in the marked cable area. The closest approach the PRINCESS LOUISE made to the outer end of Piers 57 and 58 on the first approach was $4\frac{1}{2}$ cables, or 900 yards, a cable being $\frac{1}{10}$ of a mile, or 200 yards (R. 331, 332, 347, 348, 349).

In making observations of the movements of the PRINCESS LOUISE, Captain Langworthy stated that she was *500 yards* from Pier 57 (R. 105)—this was “shortly after she changed course and headed towards Pier 64 (R. 127). He observed the PRINCESS LOUISE close to Pier 64 at about 3:20 p.m., about fifty feet from Pier 64 and at right angles with the pierhead line which runs north and south (R. 120, 121). He did not see the anchor chain until he saw the PRINCESS LOUISE backing (R. 122, 123). Captain Langworthy observed the PRINCESS LOUISE make sternway from Pier 64 and illustrated her sternway course on Respondent’s Exhibit A-1 by a red line (R. 125, 126). During the course of his observations he was a mile and a quarter away (R. 126) and the weather was clear and sunny (R. 127). This course is well north of the marked cable area (Respondent’s Exhibit A-1).

The record shows that the trial court refused to admit Respondent’s Exhibit A-11 offered for the purpose of showing the practicability and feasibility of the government safeguarding its cable by publishing and issu-

ing navigation charts marking the area and whereabouts of its Seattle-Fort Lawton cable.

A revised chart issued and printed March 17, 1958, marking the Fort Lawton-Seattle cable, was offered in evidence, being Chart 6449 (6446) for the limited purpose of showing the practicability and feasibility of marking the cable area, and the offer was rejected (R. 379). The exhibit was not marked at the time and was later marked as Respondent's Exhibit A-11, being Coast and Geodetic Survey Chart No. 6446 (R. 386).

On the issue of proper proof of damages and error in admission of hearsay evidence of damages over appellant's objection, the record shows the following:

The appellee produced a witness, Charles B. Obrien, chief cost accountant for the Alaska Communication System, U.S. Army, with a rank of Sergeant First Class (R. 149), and a qualified accountant (R. 150), acting as chief cost accountant for Alaska Communication System in the year 1955 (R. 151) and engaged in the project of preparing the costs of the job pertaining to the cable break of the Fort Lawton-Seattle cable in 1955 (R. 151). He produced Respondent's Exhibit No. 3 for identification (R. 152) and identified it as "a job order cost of the cable break, the Seattle-Fort Lawton cable break, referring to it as a ledger sheet prepared by himself in the regular course of business (R. 152).

Libelant's Exhibit No. 3 was refused in evidence and the court over objection permitted and considered hearsay evidence as proof of appellee's damages (R. 161, 162).

The foregoing affords the basis of Specifications of Error which follow.

SPECIFICATIONS OF ERROR

The Specifications of Error relied upon and each error intended to be urged are as follows:

Specification of Error No. 1

The trial court erred in finding and concluding that the SS PRINCESS LOUISE and those in charge of her were negligent in dropping and dragging her anchor in a marked and known cable area and in causing damage to appellee's submarine cable (Findings of Fact II to XIV, inclusive, Conclusions of Law, R. 13-18).

Specification of Error No. 2

The trial court erred in finding that the anchor of the SS PRINCESS LOUISE contacted and damaged appellee's submarine cable on March 21, 1955, between the hours of 3:00 and 4:00 p.m., there being a hiatus in proof that the cable was damaged during the maneuvers of the PRINCESS LOUISE between 3:00 and 4:00 p.m. on March 21, 1955 (Oral Decision, R. 381, Findings of Fact VII, XIV, R. 15, 17).

Specification of Error No. 3

The trial court erred in excluding from evidence a 1958 U.S. C. & G.S. Chart No. 6446, being Respondent's Exhibit A-11 offered for the purpose of showing the feasibility and practicability of the government marking thereon the location of the Seattle-Fort Lawton submarine cable.

Specification of Error No. 4

The trial court erred in finding that the appellee proved damages in the sum of \$6,954.23, or in any other sum, and also erred in admitting and considering hearsay evidence on the question of damages (Findings of Fact XII, Conclusions of Law III, and IV, R. 16, 18, Oral Decision R. 282, 161, 162).

The evidence admitted and the grounds urged for its rejection appear as follows:

“Q. (By MR. BROZ): Did you prepare a cost analysis of the Seattle-Fort Lawton cable repair job in 1955?

A. Yes, I did.

Q. And in the course of your preparation of that cost analysis did you find certain facts which were included in your cost analysis?

A. Yes, I did.

Q. What did you find with regard to the cost analysis preparation of this repair job?

MR. MORROW: Objected to on the ground that the question calls for hearsay evidence.

THE COURT: The objection is overruled.

A. I found that the cost of the repair of the Seattle-Fort Lawton submarine cable amounted to \$6,954.23 direct cost, this being compiled from the—

THE COURT: Just a minute. There is nothing before you. Ask him another question.

Q. (By MR. BROZ): How was that figure arrived at, Sergeant?

A. That figure was arrived at from labor records, the ship's records, which I personally went

down and audited on the job, and subsistence that was aboard the ship, in arriving at this figure. These are direct costs only."

ARGUMENT

Specification of Error No. 1

The trial court erred in finding and concluding that the SS PRINCESS LOUISE and those in charge of her were negligent in dropping and dragging her anchor in a marked and known cable area and causing damage to appellee's submarine cable (Findings of Fact II to XIV, inclusive, Conclusions of Law, R. 13-18).

The Master of the PRINCESS LOUISE, of course, had information and knowledge of the cable area as marked on the navigation chart, and of a sign between Pier 56 and Pier 57 warning vessels not to drop their anchor. He also had information and knowledge of equal importance of the depth of water and bottom underneath the surface of the water marked on the navigation chart. The Master *did not know and no knowledge is imputed to him* that the Fort Lawton submarine cable veered north from Piers 56 and 57. He had no knowledge that one of the cables, instead of going due west into deeper water, veered north outside the marked area into water having 180 feet depth or less (Respondent's Exhibit A-1).

The depth of water at the westerly end of the northerly boundary of the marked cable area shows a sounding of 197 feet on the navigation chart. On out from the westerly boundary of the cable area, all cables are free from injury by an anchor swinging free at 30 fathoms.

The submarine cables which appear on the navigation chart to go westerly from between Piers 56 and 57, drop off into deeper water as will be noted by the soundings on the chart such as 227, 258, 239, all showing bottom at which a submarine cable would be free from the anchor of a ship let out to 30 fathoms. The Seattle-Fort Lawton cable as authorized drops off to a 97-foot bottom near shore to 197 feet to 239 feet as indicated by the closest soundings, as noted by the navigation chart (Respondent's Exhibit A-1).

The situation was aggravated by the Army in 1953 by moving the Seattle-Fort Lawton cable northward of its authorized position and without notice. The aggravation was compounded by moving the cable toward piers on the northwesterly sea wall of Elliott Bay and to shallow water (Respondent's Exhibit A-1).

The 1953 change took the Seattle-Fort Lawton submarine cable north toward the 160-foot sounding on the chart. It in fact followed a 160- to 180-foot sounding curve. Compare Respondent's Exhibit A-1 showing the 1953 location of the Seattle-Fort Lawton cable with the sounding chart, Respondent's Exhibit A-10. The cable no longer rested on the bottom at 197 feet below the surface, dropping to 239 feet where an anchor let out at 30 fathoms would swing free over the cable on the bottom. It had in fact been placed where ships navigating and maneuvering with the use of their anchors in the vicinity of Piers 64 and 66 would sooner or later foul and likely damage it, not knowing as it were that the cable rested on bottom below their ships at a depth of 160 to 180 feet as the navigating chart shows (Re-

spondent's Exhibit A-1, and as verified by the sounding chart, Respondent's Exhibit A-10). The government had effectively laid the groundwork for damage to its own submarine cable.

The mariners' charts had not as of March, 1955, been revised to show the location of the cable, which would have permitted precautions by a prudent shipmaster to avoid dropping and dragging an anchor in the area.

It would have been practical and feasible to mark the chart showing the cable (Respondent's Exhibit A-11 (rejected)) to safeguard the cable so that the public and others than the Army would have been aware of the presence of the cable occasioned by the 1953 change. Why the Army did not have the Seattle-Fort Lawton submarine cable marked on the U.S. C. & G.S. charts published by the government, is anybody's guess.

The appellant should not be made to pay for damages not of their own doing. The appellee should be mulcted with the costs and expenses of its own misdoing. The lesson learned was the precaution taken subsequently in marking the boundaries of the area showing the presence of the Seattle-Fort Lawton cable (Respondent's Exhibit A-11 (rejected)).

The facts crying out for justice for reversal of the trial court's clearly erroneous findings and decision are supported by the action this court took in a previous instance where the Army moved a cable without notice. The case at bar resembles *The Georgie*, 14 F.(2d) 98 (9 Cir.—1926), where the District Court was reversed and for reasons the court should grant a reversal here. The

facts in that case showed that the United States maintained a submarine and telephone cable between the westerly end of Pier 41 in the Bay of San Francisco and Alcatraz Island, with no sign at the pier and no charts of the bay showing its location. A cable of the Great Western Power Company left the opposite corner of the same pier on which was a sign indicating the location of that cable. *The government cable and the power company's cable were about 200 feet apart. The government cable was 125 feet from the extreme end of the sign maintained by the power company.* The SS GEORGIE during the afternoon approached Pier 41 for the purpose of docking and to make the vessel swing to the tide and wind, the pilot ordered her anchor dropped damaging the government cable. The pilot had no notice or knowledge of the location of the government cable, nor was the location of the cable generally known. The court stated in the course of its opinion:

“... We agree with the court below that the act of the pilot in dropping the anchor was negligent, if as a matter of fact he knew of the location of the cable, or if as a matter of law, notice of such location is to be imputed to him.”

The trial court held that it was the imperative duty of every pilot to fully inform himself of every government cable, and his failure to do so would render his ship liable for any mishap.

In respect to the foregoing holding the court made the following statement appropriate to the case at bar:

“... In the absence of statute, we are not prepared to say that any such onerous duty is imposed by law upon those engaged in the rightful navigation of

the public waters of the state or United States. The public right of navigation in all navigable waters is the dominant one, and, should a private corporation lay a cable in public waters without notice or warning, we apprehend it will not be claimed that such corporation could maintain an action against any vessel that might cause injury to the cable in the lawful exercise of this dominant right. And, while the United States is not responsible for the negligence of its officers or agent, yet if public property is needlessly exposed to peril by such officers or agents, the responsibility for its destruction should not be shifted to those who may happen to injure it in the lawful exercise of a right conferred by law."

The cable in question at Pier 41 at San Francisco had been changed from another location about five months before the accident and without notice.

In deciding the case in *The Georgie*, the Court of Appeals adopted by analogy duties imposed by the California Code on private corporations owning and maintaining cables. The Code precluded recovery for damages to submarine cables "unless such corporation has previously erected, on either bank of the waters under which the cable is placed, a monument indicating the place where the cable lies, and publishes for one month in some newspaper, most likely to give notice to navigators, *a notice giving a description and the purpose of the monuments, and the general course, landings, and termini of the cable*" (emphasis supplied). The Court of Appeals went on to say:

"The government is not bound by the state statute, but that statute prescribed a sound and whole-

some rule of public policy, and it would seem that the government is in duty bound to give some notice or warning of some kind as to the location of these numerous submarine cables over which vessels of every kind are constantly moving.

“The libel is, of course, based on negligence, and the mere dropping of an anchor in public waters in the vicinity of an unknown and unmarked cable does not constitute such negligence.”

The PRINCESS LOUISE was in any event not negligent. The undisputed facts conclusively demonstrate that the PRINCESS LOUISE was never, never within the boundaries of the marked cable area. This is demonstrated by the following points:

1. The appellee's own witness, Burt Langworthy, harbor man by whose testimony appellee should be bound, testified that the PRINCESS LOUISE came on her “normal course into the harbor and in towards the pier” (R. 101). And though she came farther south than usual, made necessary by a southeasterly wind, Langworthy testified that her most southerly position “could have been as far as Pier 59” at the time she made her turn (R. 102). He observed the PRINCESS LOUISE *500 yards* from Pier 57 (59) (R. 107). The witness had been talking about Pier 59 and government counsel injected 57 into a question which leaves in doubt whether the witness had in mind Pier 57 or Pier 59, but he definitely stated Pier 59 (R. 101, 102). If the witness meant Pier 57 instead Pier 59 as to the place the PRINCESS LOUISE made her turn, still the westerly boundary of the cable area is 420 yards from Pier 57 and it is immaterial whether the witness meant Pier 57

or 59 as the 500 yards off either pier would place the PRINCESS LOUISE well outside the marked cable area. Burt Langworthy thus has placed the PRINCESS LOUISE not only outside the marked cable area, but in deep water of 197 or more feet to bottom. By appellee's own witness, one of appellee's most important witnesses, the PRINCESS LOUISE was not within the cable area marked on the chart when she made her first approach to the C.P.R. Dock, Pier 64 (Respondent's Exhibit A-1).

2. Did the PRINCESS LOUISE back into the *marked* cable area following her first approach to the dock? This was impossible under existing weather conditions of a southeast gale 35 to 45 miles per hour, which blew the ship north away from the cable area. This was also illustrated by appellee's witness, Burt Langworthy, who so testified (R. 123), and then drew the course of the PRINCESS LOUISE as she backed down from her attempted landing at the C.P.R. Dock. While backing, her course was also to leeward. The southeasterly gale hitting her broadside blew her to the north. The combined forces of engines astern and of wind blowing the vessel north took the PRINCESS LOUISE on a north-west course as she backed away from the C.P.R. Dock. Burt Langworthy drew such a course on Respondent's Exhibit A-1 (R. 124, 125). The course of the PRINCESS LOUISE backing down from her first attempted landing was just exactly in the opposite direction from the marked cable area on the chart (Respondent's Exhibit A-1). What could be more conclusive than the cross-examination of appellee's own witness on the issue as to whether or not the PRINCESS LOUISE backed into the

cable area so marked on N.S. C. & G.S. Chart 6449 (Respondent's Exhibit A-1) ?

3. There is, of course, no evidence or contention that the PRINCESS LOUISE maneuvered within the *marked* cable area on her second approach to the C.P.R. Dock assisted by the tug TITAN. There is no contention that the use of a tug on this occasion was negligent, nor is there any evidence or contention that the use of one or two anchors to assist a ship in docking is negligent. If the anchor of the PRINCESS LOUISE dragged the cable on her second approach, it would have been moved to the north. Instead it was moved to the south 75 yards from its 1953 plotted position (Respondent's Exhibit A-1, R. 302).

4. The physical damage to the cable supports the contention of the PRINCESS LOUISE. The length of the cable picked up from the sea wall at the foot of University Street between Piers 56 and 57 and measured to the position of the break, measured 3,450 feet (R. 298). Damage identified by the Master of the cable ship as having been caused by a grapnel or anchor measured 500 feet from the broken end, or in other words, back only 133 yards from the position of the break (R. 241, 242). The direct distance from the sea wall to the position of the break is 1,100 yards, or 3,300 feet (R. 302). The position of the break as measured to the closest marked cable area is 450 yards, according to the Master of the cable ship (R. 293). (This actually measures 500 yards — see Respondent's Exhibit A-1). The place where an anchor hooked the cable is at least 1,000 feet outside, beyond and away from the marked cable area.

The inescapable conclusion from the foregoing is that, if the anchor of the PRINCESS LOUISE, or any other vessel, contacted the cable, the contact was made well outside the marked cable area, according to appellee's own evidence.

5. The facts are contrary to appellee's own theory as to how the anchor of the PRINCESS LOUISE damaged the cable.

Appellee's apparent theory was that the anchor of the PRINCESS LOUISE dragged the Seattle-Fort Lawton submarine cable *northward* from a position within the marked cable area to the position of the break and beyond the cable area marked on the chart (R. 244, 245). Quite true, the position of the break is north of the cable as shown in the War Department Permit (Respondent's Exhibit A-1). When called and examined as a witness by appellant (R. 284), the Master of the cable ship testified:

"A. The position at which the Seattle end was picked up is *south* of the position the cable was replaced in 1953 a distance of approximately 75 yards.

Q. Could that cable have been disturbed in a southerly position in your opinion by a ship backing with his anchor out?

A. If the anchor were dragging on the bottom, yes." (R. 302)

Not only did the cross-examination of the Master of the cable ship establish the submarine cable had moved south by disturbance such as an anchor, rather than north as previously testified, but it was shown also that

the distance of the movement was 75 yards before the break occurred. Moreover, if the cable was disturbed by the anchor of the PRINCESS LOUISE it was while the PRINCESS LOUISE was backing.

6. The testimony of William M. Martin, Supervising Photographer, is quite conclusive. He testified to the cable areas and distances and to depths of water in the vicinity of the cable area in question (R. 128, 129). He stated that at 4:00 o'clock p.m. on March 21, 1955, the stage of the tide was 9.3 feet, and at 3:00 p.m. the same day it was 8.7 feet (R. 141). He said to get the depth of water at any stage of the tide you had to add the sounding marked on the chart, which is in feet, to the stage of the tide. For example, if you had a sounding of 180 feet at 4:00 p.m. on March 21, 1955, the depth of the water, surface to bottom, would be 189.3 feet (R. 141).

The anchor chain of the PRINCESS LOUISE was lowered 30 fathoms, or 180 feet (R. 325). To get the depth of the anchor in the water it is necessary to add the length of the shank of the anchor which is 8 feet long (R. 355); therefore, with 30 fathoms of chain out and the shank of the anchor 8 feet long, the anchor of the PRINCESS LOUISE would touch bottom during maneuvers at 188 feet below the surface of the water. Thus, without going into fractions, by adding the height of water of 8.7 feet and 9.3 feet in the flood tide to obtain the depth of the water, it appears the anchor shank of the PRINCESS LOUISE of 8 feet offsets the increased depth of the water by reason of the flood tide. That is to say the anchor would swing free during maneuvers where

the soundings on the chart show water at soundings of 180 feet. Only at soundings of 180 feet or less would the anchor touch bottom so as to hook a submarine cable.

The soundings on the chart within the marked cable area show depths of water 100 yards off Pier 57 of 94 feet, and 420 yards off Piers 57 and 58 of 197 feet (Respondent's Exhibit A-1). It appears that 400 yards offshore from seawall there is a 180-foot sounding which is 200 yards off Pier 57. For the PRINCESS LOUISE's anchor to have fouled the submarine cable of appellee within the marked cable area, she would have had to have been within 200 yards of Pier 57 or 58. Appellee *claims* that the PRINCESS LOUISE backed into this area. But it is established by the appellee that the PRINCESS LOUISE went astern from her own dock and she backed toward West Seattle, or southwest, which is away from the marked cable area. This is by Col. Rogers' own testimony (R. 51). Appellee's other witness, Capt. Langworthy, was of course more accurate and confirmed Capt. Campbell. He has stated and demonstrated that the PRINCESS LOUISE, when she went astern, took a course northwest due to the wind blowing her north (Respondent's Exhibit A-1). She could not have picked up the cable with her anchor 600 feet off Pier 57 where Col. Rogers said he saw her because, first, she was never there, and second, there is no evidence of damage to the cable within 400 yards from the seawall, where 200 yards off Pier 57 would place her. Physical evidence of an anchor having damaged a cable appeared 500 feet from the broken end. The position of the break was 3,300 feet from the seawall at Pier 57. This would place a ship whose anchor struck the cable 933 yards from

the seawall as against 400 yards by estimate of Rogers. The only explanation is, of course, that the submarine cable veered north outside and beyond the marked cable area in water of less than 180 feet depth as shown by the charts where it caught the unsuspecting anchor of the PRINCESS LOUISE or some other innocent ship.

If the PRINCESS LOUISE or some other vessel dragged the Army cable by her anchor, the anchor picked the cable up north of and well outside the cable area marked on the chart, and in 30 fathoms or less of water where it was likely to catch the anchor of a ship navigating in the area, a ship innocent of the unauthorized and unpublished change in location.

Specification of Error No. 2

The trial court erred in finding that the anchor of the SS PRINCESS LOUISE contacted and damaged appellee's submarine cable on March 21, 1955, between the hours of 3:00 and 4:00 p.m., there being a hiatus in proof that the cable was damaged during the maneuvers of the PRINCESS LOUISE between 3:00 and 4:00 p.m. on March 21, 1955 (Oral Decision R. 381, Findings of Fact VII, XIV, R. 15, 17).

The question presented is, was there any evidence that appellee's cable sustained physical damage by a ship's anchor during the aforesaid period of time, or any evidence from which there could be a reasonable inference that the cable was damaged during that period of time? It is believed that a necessary link in the chain of proof is lacking here. Appellee proved the cable sustained physical damage and was likely caused

by a ship's anchor, but did not prove that the damage was caused by the PRINCESS LOUISE. In order to show that the cable was damaged by the anchor of the PRINCESS LOUISE it would seem necessary for appellee to prove that actual physical damage occurred between the hour of 3:00 and 4:00 p.m. on March 21, 1955. The admitted facts admit "that the submarine cable . . . was parted during the week of March 20, 1955" (R. 9). The submarine cable could have been damage any time during that week under the admitted facts. There is no elimination of the possibilities that another vessel's anchor caused the damage before 3:00 p.m. on March 21, 1955. Nor has the possibility been eliminated that the damage was caused after 4:00 p.m., or some other day of the week. The PRINCESS LOUISE simply has not been identified as the ship causing the damage, but only as a ship who had her anchor out in the vicinity of the C.P.R. Dock on March 21, 1955, between 3:00 and 4:00 p.m.

The appellee produced no witnesses or records from Seattle or Fort Lawton which it undoubtedly could have done to show exactly when the submarine cable sustained physical damage. Nor was any witness or record produced from Adak or other A.C.S. stations other than Kodiak to show interruption of service between Fort Lawton and Seattle. The communications officer from Kodiak merely concluded that the phone between Seattle and Fort Lawton was out of order from 4:05 o'clock p.m. to 4:20 o'clock p.m. on March 21, 1955, from a record stating "line trouble." The logical inference from the A.C.S. records is that the line being

out only fifteen minutes sustained no physical damage of such a serious and lasting nature, as the line was out only during a fifteen-minute period. Of course, the further inference is that there was no damage at all between 3:00 o'clock and 4:00 p.m. on March 21, 1955, because the service at that time was being worked by Adak. Appellee obviously failed to identify the PRINCESS LOUISE as the vessel whose anchor caused the damage.

Specification of Error No. 3

The trial court erred in excluding from evidence a 1958 U.S. C. & G.S. Chart No. 6446, being Respondent's Exhibit A-11 offered for the purpose of showing the feasibility and practicability of the government marking thereon the location of the Seattle-Fort Lawton submarine cable.

A navigation chart, U.S. C. & G.S. 6449 (6446) showing a cable area marked in the vicinity of the Canadian Pacific Dock was offered in evidence for the very limited purpose of showing the practicability and feasibility of marking the cable area (R. 379, Respondent's Exhibit A-11). The markings on the chart show that the Seattle-Fort Lawton submarine cable could have been safeguarded from injury by marking the area on the chart which would have conveyed notice to the mariners and masters such as the master of the PRINCESS LOUISE, the location and existence of the submarine cable.

The government had a duty to give notice of the location of the Seattle-Fort Lawton submarine cable.

The Georgie, 14 F.(2d) 98 (9 Cir.—1926). The duty the government could and should have performed was the publishing and issuing of navigation charts marking the boundaries of the Seattle-Fort Lawton cable. The exhibit was admissible for the purpose of showing the feasibility and practicability of the government safeguarding its own cable against injury by vessels dropping anchors in a heavily navigated area off the Bell Street Terminal and the Canadian Pacific Dock. The government by publishing and issuing a chart showing the cable could have safeguarded itself against damage and injury to the cable.

In *Carstens Packing Co. v. Swinney*, 186 Fed. 50 (9 Cir.—1911), this court in dealing with the admissibility of evidence subsequent to the time of injury, showing the practicability and feasibility of safeguarding against injury, held that such evidence was admissible. In a case where the defendant covered vats subsequent to the injury of the plaintiff, the court stated:

“In the present case evidence that the defendant covered the vats subsequent to the injury to plaintiff tended to show that the vats could be reasonably safeguarded by being covered and that they could be so protected with due regard to the ordinary uses of such vats. The evidence tended to point out the duty of the defendant with respect to these vats. If a subsequent act is admissible to point out the party who is charged with a duty, where that question is an issue of fact, it seems to us that it is equally admissible to point out the specific duty with which the party is charged when that question is an issue of fact and the evidence is limited to that issue.”

The court clearly erred in excluding chart U.S. C. & G.S. 6446, Respondent's Exhibit A-11, which shows the government could have prevented the damage to its own cable by publishing and issuing a navigation chart showing the location of its submarine cable.

Specification of Error No. 4

The trial court erred in finding that the appellee proved damages in the sum of \$6,954.23, or in any other sum, and also erred in admitting and considering hearsay evidence on the question of damages (Findings of Fact XII, Conclusions of Law III, and IV, R. 16, 18, Oral Decision R. 282, 161, 162).

The evidence admitted and the grounds urged for its rejection appear as follows:

“Q. (By MR. BROZ): Did you prepare a cost analysis of the Seattle-Fort Lawton cable repair job in 1955?

A. Yes, I did.

Q. And in the course of your preparation of that cost analysis did you find certain facts which were included in your cost analysis?

A. Yes, I did.

Q. What did you find with regard to the cost analysis preparation of this repair job?

MR. MORROW: Objected to on the ground that the question calls for hearsay evidence.

THE COURT: The objection is overruled.

A. I found that the cost of the repair of the Seattle-Fort Lawton submarine cable amounted to \$6,954.23 direct cost, this being compiled from the—

THE COURT: Just a minute. There is nothing before you. Ask him another question.

Q. (By MR. BROZ): How was that figure arrived at, Sergeant?

A. That figure was arrived at from labor records, the ship's records, which I personally went down and audited on the job, and subsistence that was aboard the ship, in arriving at this figure. These are direct costs only." (R. 161, 162)

The only evidence on damages based upon costs was produced by the chief cost accountant for the Alaska Communication System, who in the spring of 1951 prepared a cost analysis of the cable repair job (R. 149, 151) which cost analysis was identified as a job order ledger sheet, being libellant's Exhibit No. 3, R. 152) and *which ledger sheet was offered* in evidence (R. 153, 163), admitted (R. 163) and *finally rejected* in evidence (R. 184, 185). The court having considered only oral testimony of a hearsay nature as proving damages, appellee failed in its proof of damages. The court, of course, should have sustained appellant's objection to the hearsay evidence on damages and it was error not to do so.

Where there is no previous evidence of items of damage, a general sweeping statement as to the amount of damages is not permissible. 25 C.J.S. Damages, §157, p. 805.

The appellee failed to prove by competent evidence cost of repairs and their reasonableness. The witness obviously had no personal knowledge but had gained the information from a ledger sheet which he had pre-

pared and the evidence he gave in respect to damages was purely hearsay. The hearsay evidence at most only amounted to a conclusion of the witness.

CONCLUSION

It is respectfully submitted that the lower court committed reversible error — as herein stated; that the decree herein should be reversed and the case remanded with instruction to enter a decree in favor of appellant dismissing the libel.

Respectfully submitted,

BOGLE, BOGLE & GATES

THOMAS L. MORROW

*Proctors for Appellant
Canadian Pacific Railway Co.*

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the third is the fact that the

the fourth is the fact that the

APPENDIX LISTING EXHIBITS

Plant's Exhibits

	<i>Identified</i>	<i>Offered</i>	<i>Admitted</i>	<i>Rejected</i>
A.C.S. Station Log	R. 66	R. 68, 73	R. 73	
Tidal Record	R. 138	R. 139	R. 139	
Job Order Cost Sheet	R. 152	R. 153 163, 216	R. 163	R. 184, 185, 216
Charter Party	R. 204			R. 207
War Dept. Permit	R. 205	R. 205	R. 205	

Pondent's Exhibits

U.S.C.&G. Chart 6449	R. 124	R. 124	R. 124	
Martin's Chart	R. 147	R. 147 (Withdrawn R. 375)		R. 149
Log Basil Lenoir	R. 194	R. 194	R. 195	
Deck Cable Report 1955	R. 250	R. 250	R. 250	
Deck Cable Report 1953	R. 250, 251	R. 252	R. 252	
Pilot House Log 1953	R. 252	R. 252	R. 252	
Pilot House Log Princess Louise	R. 270	R. 271	R. 271	
Engine Room Log Princess Louise	R. 271	R. 271	R. 271	
Port of Seattle Map Harbor Map	R. 272	R. 272	R. 275	
0 Sounding Chart	R. 276	R. 276	R. 279	
1 U.S.C.&G. No. 6446	R. 379	R. 386		R. 386

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a corporation,

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v.

UNITED STATES OF AMERICA,

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UNITED STATES OF AMERICA,

Cross-Appellant,

v.

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a corporation,

Cross-Appellee.

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NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE UNITED STATES OF AMERICA,
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JUL 27 1959

PAUL P. O'BRIEN, CLERK



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a corporation,

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF FOR THE UNITED STATES OF AMERICA,
CROSS-APPELLANT AND APPELLEE

STATEMENT OF JURISDICTION

The jurisdiction of the court below was founded upon 28 U.S.C. 1333, and the Act of June 19, 1948, Chapter 526, 66 Stat. 496 (46 U.S.C. 740) by virtue of a libel (R. 3) in a cause of collision between a vessel and a submarine cable.

The jurisdiction of this court is founded upon 28

U.S.C. 1291, by virtue of a notice of appeal (R. 20) from the final decree (R. 19) below.

QUESTIONS PRESENTED

1. Whether the trial court findings of fault and causation were clearly erroneous;
2. Whether the trial court erred in admitting evidence of libelant's damages;
3. Whether the trial court erred in refusing to admit and in striking additional evidence of the damages awarded libelant, and
4. Whether the court erred in overlooking and failing to find further damages in the amount of \$1,983.27 on the basis of uncontradicted testimony.

STATEMENT

Appellee (Libelant below) brought this action to recover damages to its submarine cable occasioned when appellant's vessel fouled said cable with its anchor during maneuvers attempting to dock said vessel at Pier 64, Seattle, Washington on March 21, 1955.

In March of 1955 and prior thereto appellee owned and maintained a submarine cable between Alaska Communications System facilities in Seattle and points north, the cable being part of a communications complex connecting Fort Lawton and Alaskan points with

the Seattle ACS facility in the Federal Office Building. (R. 37, 62) The cable commenced from the shore at Pier 57 and extended outward in a western direction at the bottom of Elliott Bay, its depth increasing as the bottom contours sloped downward to greater depths away from shore. (R. 37, Respondent's Exhibit A-1) The cable area was marked on navigation charts prepared and published by the United States Coast and Geodetic Survey (Respondent's A-1). During the period in question such charts were in publication and available to any at a price of \$1.00, and said charts delineated the cable area out from the shore to a depth of approximately 180 to 197 feet, depicted thereon by red dotted lines marking said area for any who might be using ground tackle near the harbor facilities. (Respondent's A-1, R. 130, 131) Likewise, the cable area was marked by a large sign visible to mariners maneuvering in the vicinity of the harbor facilities located there and adjacent on either side. (R. 351-352)

On March 21, 1955, SS PRINCESS LOUISE, appellant's single screw passenger ship of some 4,000 tons and 320 feet in length, arrived in Elliott Bay and began maneuvers to land at Pier 64. (R. 39, 100, 101) While so engaged, without the aid of a tug, her approach attempt was seen to take her further south than usual, there being a southeasterly wind of 35 knots at the time. (R. 99, 100, 101, 102) During these ma-

neuers she was seen to have her starboard anchor on the bottom and dragging, this latter fact being demonstrated by the angle or "scope" at which the ship's anchor chain stood out from the hawse. (R. 103, 104, 107, 108) Her attempt was to moor on the south and weather side of Pier 64. (R. 321) This is 800 feet north of the red line stub extending out from the shore to deep water and indicating the shoreward cable area within which appellee's submarine cable lay, as depicted on the Coast and Geodetic Survey Chart. (Respondent's Exhibit A-1) The ship is 320 feet in length, her hawse and anchor chain being at her bow extremity; the length of chain in the water at the time was 180 feet, (R. 325), the depth of water in the area being less than said length of anchor chain and decreasing toward the shoreline. (Respondent's Exhibits A-1 and A-10) The ship came well south of Pier 64 in order to make provision for the effect of the strong wind pushing her rapidly northward during her approach. (R. 101, 103, 106) She failed in her first attempt and backed out for a second try, still dragging her anchor, (R. 107, 329) and on her next attempt accepted the services of a tug, successfully completing her mooring at 3:48 P.M. (R. 323), an hour later than her scheduled docking at 2:45 P.M. (R. 341). Thus, SS PRINCESS LOUISE, at some time during the hour preceding 3:48 P.M., her docking time, was seen over the

cable area off Pier 57 and northward. (R. 102, 105, 42, 43, 51, 57) Her captain testified she backed out, worked upwind to the *southeast*, turned *left* from southeast to east and around until she was heading northerly (R. 325, 358-360), all the time towing her ton and a quarter anchor which had a shank of some 8 feet in length and 30 fathoms (180 feet) of chain in the water (R. 355, 325). The depth in the cable area vicinity where she was seen and where she turned, swinging left and closing inshore in her approach, was less than the reach of her anchor. (Respondent's Exhibit A-1)

Communication traffic and routine circuit tests on the ACS cable were made hourly between Alaskan stations and ACS facilities in Seattle. (R. 74-79) Communication had been routine until it was lost after 3:00 P.M. on March 21, 1955 when the last contact was had with Adak (R. 79-81) and was found inoperative at 4:00 P.M. when Kodiak could not get through to Seattle. (R. 82-84)

When the repair of the cable was undertaken on March 23, 1955 by appellee's employment of its cable repair ship M/V LENOIR (R. 230-234), the cable was picked up beginning at the shore end and was found damaged for a considerable distance, the damage increasing in intensity westward as the cable extended

into deeper and deeper water until it was found broken and dragged out of position at a depth of approximately 180 feet (30 fathoms). (R. 219-228, 238)

The inshore broken end was taken aboard in a position some 225 feet, or 75 yards, southerly from its original position as laid in 1953. (R. 301-303)

The cable repair ship LENOIR was occupied 6 days from 11:00 A.M., March 23, 1955 to 10:00 A.M., March 29, 1955, inclusive (R. 247) in accomplishing sufficient repair of the cable to provide the minimum service then required by appellee. (R. 240)

The per diem cost of operation of LENOIR to appellee was \$1,500.00 per day, making her cost to appellee for cable repair work on this occasion 6 days at \$1,500.00 per day, or approximately \$9,000.00. (R. 164) The direct costs allocated to the repair job by the Alaska Communications System headquarters was \$6,954.23, which figure, however, was not all inclusive. (R. 162, 188-189)

The court found that appellee's cable was lawfully located, its area properly posted and charted, the knowledge of which was chargeable to the master and those in charge of PRINCESS LOUISE on March 21, 1955; that PRINCESS LOUISE negligently employed her anchor in the vicinity of the cable area, and contacted, damaged and parted libelant's cable due to

failure to observe and maintain a position clear of the same, that appellee was damaged in the sum of \$6,954.23 in direct costs for which appellant was liable (R. 14-17). The court, on September 15, 1958, decreed recovery to appellee in like amount. This appeal followed (R. 19-20).

The foregoing statement reflects the basis of appellee and cross-appellant's argument and specification of errors in limiting appellee's damages to \$6,954.23, set forth as follows:

SPECIFICATION OF ERRORS

Appellee and Cross-appellant's Specification of Error No. 1:

The trial court erroneously failed to allow cross-appellant and appellee damages based on the daily operational costs of the appellee's cable repair ship for the period during which said ship was exclusively engaged in the cable repair occasioned by the negligent damaging and breaking of the Seattle-Fort Lawton submarine cable by appellant.

Specification of Error No. 2:

The trial court erroneously concluded that the only damages recoverable by cross-appellant and appellee was the sum of \$6,954.23 incurred for cable repair work performed by cross-appellant — appellee.

Specification of Error No. 3:

The trial court erred in excluding and striking the Libelant's Exhibit 3, designated as the job order cost sheet.

ARGUMENT**I.****THE EVIDENCE BEFORE THE TRIAL COURT FIRMLY ESTABLISHED RESPONDENT'S LIABILITY.**

Contrary to appellant's specifications of error, the evidence conclusively shows that SS PRINCESS LOUISE and those in charge of her were negligent in lowering her anchor out to 180 feet of chain in the water and dragging the anchor in the marked and posted cable area, that the cable was damaged and communications failed within the same hour as her negligent maneuver took place and that appellee's cable location was adequately marked.

1. The position of SS PRINCESS LOUISE in the cross-appellant's cable area was clearly fixed by the evidence. On March 21, 1955, SS PRINCESS LOUISE, a 4,000-ton single screw vessel of approximately 320 feet in length, owned by appellant (R. 35) arrived in the Seattle harbor and at about 3:00 P.M. was seen to be making her approach to her intended mooring at Pier 64. (R. 100) She was seen by an experienced

observer, Harbor Patrolman Langworthy, to make what he designated as her normal course into the harbor except that when she swung toward her pier, she came farther south than usual due to the force of the wind from the southeast. (R.101) This maneuver, including the observed track farther south than usual, was observed by the harbor patrolman between 3:00 P.M. and 3:30 P.M., when his view was cut off by his entry into his mooring at Pier 49. (R. 101) Since this observer was down harbor in West Waterway (Respondent's A-1) off the piers to the southwest of PRINCESS LOUISE's position (R. 106, 112), his angle of vision revealed her as being farther south than she normally was, but less accurately as to the distance, or feet. (R. 101, 102) He stated on direct examination (R. 102) that she turned left toward the piers in the vicinity of Piers 59 and 57, approximately *a tenth of a mile* off the pierhead line and farther south than he was accustomed to see her maneuver. (R. 102, 103) The witness described observing that PRINCESS LOUISE's starboard anchor was down at this time and that the anchor was dragging as demonstrated by the angle at which the chain extended from the hawse on the bow of the ship (R. 103, 104, 107) The witness further testified as to his familiarity with the area in which these maneuvers were observed to take place, that there was a sign posted in that vicinity warning of

the existence of the submarine cable and prescribing use of anchors (R. 104, 105), and that PRINCESS LOUISE was so engaged due west of Pier 57 during her turn. (R. 105)

Under rigorous cross-examination by appellant's proctor, the witness demonstrated his intimate familiarity with the waterfront, the piers and area in question, and his accurate powers of observation, awareness of locations and distances, his basis therefore, as well as his disinterested objective attitude. (R. 114 - 122) This witness noted the awkward plight into which PRINCESS LOUISE fell (R. 112, 120, 121) as a result of the imprudent nature of her mooring attempt from upwind of her intended dock. (R. 261-263) That his observations were clear and distinct and assisted by binoculars was established on cross - examination. (R. 126, 127) The red line and positions "P-1" and "P-2" on Respondent's A-1 were the witness's estimate of her position *after* the southerly approach, dragging anchor, and reflect her backing (R. 124, 125) out of the mess she got into by her negligent attempt to approach downwind without aid of a tug. The witness corrected a brief impression created by appellant's cross examination, that the anchor had been observed for the first time when dragging only some 50 feet off Pier 64: he stated he observed this earlier when she was heading southerly

and began to change her course and swing around to head for Pier 64. (R. 127) This, of course, occurred at the southernmost point of her approach, i.e., the farthest point upwind as she crossed the cable area while so using her anchor.

Another witness, Colonel George F. Rogers, who was then the executive officer in charge of the Seattle Alaska Communications System facility (R. 36) recalled seeing PRINCESS LOUISE in the vicinity of Pier 57 and the cable area (R. 38, 39), immediately becoming concerned over damage to the cable and calling his engineering department to expect trouble (R. 43). He testified to being in an excellent vantage point on the fifth floor of the Federal Office Building some 600 yards in direct line to the vicinity of the cable area off Pier 57 (R. 41), and some 300 yards in direct line to the pier itself.

The impact of his testimony, reiterated under questioning by the court and on cross-examination, was that he observed PRINCESS LOUISE some two ship lengths off Pier 57 (R. 41, 42), or 600 feet (R. 41, 58). Vigorous cross-examination confused the witness somewhat but he remained firm on his primary recollections, i.e., that A.C.S. had a cable area off Pier 57, that he saw the PRINCESS LOUISE in it with an

anchor out, and whether she was backing or had headway he didn't now know. (R. 51-52)

2. That the cable was properly laid within the marked area shown on charts in general distribution and use by mariners was also clearly shown by the testimony of Captain John Bowen, Master of the cable repair ship LENOIR. (R. 232, 285, 287, 306, 318) It was the northernmost of several laid in that area and extending westerly into deeper water. (R. 314) That it was hooked and damaged by a heavy object [the PRINCESS LOUISE's anchor (Finding VII)] is attested by the cable foreman, Mr. Christensen, who was in LENOIR's bows watching the cable as it came up over the reel during recovery of the damaged cable here in question (R. 219). That the cable, which had a tensile strength or breaking strength of 25 tons (R. 307), had been hooked and dragged out of its position of rest, was obvious by the abnormal condition observed at the sea wall or shore terminal where it was found to be stretched out tight to seaward (R. 237) instead of hanging straight down in its normal position. Mr. Christensen described it as "bar tight", too tight to remove without cutting. (R. 219-220)

Keeping in mind that the cable area was marked out to deep water — the boundary markers extending nearly 600 yards from the shore line along the north

boundary and well over 700 yards out from the shore line along the south boundary (Respondent's Exhibit A-1) and out to depths of 180 feet and 197 feet as shown on the same exhibit (Respondent's A-1) which was in publication and distribution in March of 1955 (R. 130), Mr. Christensen's testimony corroborates the mute evidence of the rigidly stretched cable at its shore connection (R. 219-220). He testified that from his vantage point at the bow where the cable came in over the reels approximately 1,500 feet were picked up and noted in ". . . fairly good condition, but from then on I observed that something had been dragging along the cable and had scuffed the outer jute" (R. 220) In his response shortly after this question he stated the scuffing showed for ". . . I would say a thousand feet." (R. 221) Then approximately 500 feet from the end the cable showed severe scuffing with all the jute torn off, scarring the steel armor in the last 200 feet with shiny, fresh appearance to the broken end. (R. 221) (Repeated on cross-examination by respondent and examination by the court, R. 222-228) Now, simply adding the figures of 1,500 feet observed in fairly good condition, approximately 1,000 feet markedly scuffed, 500 feet sufficiently scuffed to tear off the jute and 200 feet with scarred steel, totals 3,200 feet which approximates the 3,450 feet figure testified to by Captain Bowen (R. 298, 308) as being

the length of the segment from the shore terminus at the sea wall out to the break. It is clear from the evidence that the first sign of damage, which grew progressively worse as the depth increased out to the broken end, was well within the cable area. The damage observed as commencing 1,500 feet out from the shore sea wall conclusively establishes that the cable was hooked by the PRINCESS LOUISE anchor well within the cable area and dragged along its length until, with the increase in depth while the scope or length of chain suspending the anchor and appellee's cable remained constant, the strain increased until the breaking point was finally reached during PRINCESS LOUISE's maneuver out to deeper water for another try at docking. There has been set forth ample basis for the trial court's findings in this respect and certainly that court's finding should not be disturbed in absence of clear error. *Portland Tug & Barge Co. v. Columbia River Towing Co.*, 153 F. 2d 237, cert. den., 328 U.S. 863; *Petrich v. Hansen*, 204 F. 2d 261 (C.A. 9); *Oaksmith v. Garner*, 205 F. 2d 262 (C.A. 9); *The San Francisco*, 172 F. 2d 767 (C.A. 9); *Heder v. U. S.*, 167 F. 2d 899 (C.A. 9); *Bornhurst v. U. S.*, 164 F. 2d 789 (C.A. 9); *Meintsma v. U. S.*, 164 F. 2d 976 (C.A. 9); *The Rocona*, 173 F. 2d 661 (C.A. 9); *Rogers v. Pacific Atlantic Steamship Co.*, 170 F.

2d 30 (C.A. 9); *Borcich v. Ancich*, 191 F. 2d 392 (C.A. 9).

Certainly the evidence in this case has established appellant's liability beyond that required to justify the trial court's findings relating to said liability. The evidence has shown the appellant's culpability with respect to the breaking of the cable to an extent seldom found in similar reported cases, lacking only an eyewitness to the undersea contact between the PRINCESS LOUISE's anchor and cross-appellant's cable to remove any doubt from the issue. The preponderance of the evidence, however, clearly establishes appellant's liability. *The PRINCESS ALICE*, 239 Fed. 587 (1917); *New Jersey Bell Telephone v. Standard Oil Company*, 88 F. Supp. 806 (1949); *New York Telephone Co. v. Cities Service Transp. Co.*, 23 F. Supp. 426 (1938); *The ELSIE*, 288 Fed. 575 (1923); *The VINDEGGEN*, 252 Fed. 209 (1918); *The City of Oakland*, 277 Fed. 969 (1922).

3. That the maneuver which resulted in this damage was imprudent and contrary to the normal good practice of seamen and was a negligent act is established by the expert testimony of Captain A. S. Howell. Captain Howell did not say it would be imprudent to use an anchor in a cable area — this is too basic to be an issue; he does testify that under the conditions pre-

vailing on March 21, 1955 he would "never get upwind on the dock . . . you can't control the ship that way". (R. 261) He stated he would not be able to handle the ship if an approach was made from the upwind or southerly side of the intended dock. (R. 262, 263) This agrees with the testimony of another disinterested witness and boatman, Mr. Langworthy, who observed the inability of those in charge of PRINCESS LOUISE to control her, (R. 120, 121) and which fact finally resulted in her belated use of a nearby tug (R. 356) to extricate her and to assist her back out into the harbor for a second try. (R. 107)

Further, the captain of PRINCESS LOUISE admitted he left his anchor out during not only the first attempt, but the second (R. 329, 330) because he "didn't see any point in heaving it in, as according to the depth of water shown on the chart and the position I was approaching from" This in the vicinity of a cable area and which he knew was there. (R. 351, 352) Yet Captain Campbell had no bearings taken, plotted or recorded, nor did his officers make any observations of position. (R. 371, 372, 375) He fixed his position, that of a 320-foot single screw ship with an anchor out on at least 180 feet of chain, perhaps more, merely by eyeing Piers 63 and 64. (R. 344-346, 349) Nor did he take or cause to be taken any depth soundings to assist in determining his position during this time. (R. 360)

This at a time when he was in obvious difficulty in a rash attempt to land upwind from the dock in a southeast gale, making him about an hour late in docking, during which he rang down 44 engine orders, sometimes as many as 4 orders within a minute. (R. 352-354)

That PRINCESS LOUISE entered the cable area with her anchor dangling at the end of at least 180 feet of chain, on at least one occasion, is admitted by Captain Campbell, beginning at R. 358 where he stated he was underway, headed southeast for the Smith Tower (shown on Respondent's A-1), " . . . about 3 or 4 cables off the wharf" (600 to 800 yards off the wharf — either Pier 57 or Pier 64, probably Pier 57), going straight ahead (R. 358), then turning left and bringing a 320-foot ship around toward east and then northeast (magnetic) which the captain correctly testified was east-northeast true, making headway all the time and without taking any soundings. (R. 359-360) Plotting this on Respondent's A-1 will quickly show that at 600-800 yards off either Piers 57 or 64, heading southeast toward the Smith Tower and *turning left*, which is *east* and *in-shore*, invasion by PRINCESS LOUISE of the marked cable area in depths of 180 feet or less was certain.

4. The record conclusively shows that PRINCESS LOUISE was in the marked cable area at the time when the subject cable was broken. The PRINCESS LOUISE succeeded in docking at 3:48 P.M. (R. 323) She was due to dock at 2:45 P.M. (R. 324). Between 2:45 P.M. and 3:48 P.M. she was engaged in the maneuver during which 44 engine orders were recorded (R. 356 and Respondent's Exhibit A-8, page for March 21, 1955). Until this period, communications between Seattle and Alaska Communications System facilities and Alaskan stations had been uneventfully carried out (R. 74-76, 79) and were recorded by the Kodiak ACS station hourly through 3:00 P.M. Seattle time (R. 74-75, 79). The next time Kodiak was due to be "... normally and invariably ..." contacted by Seattle was at 4:01 P.M. Seattle time when no signal could be heard (R. 82). The Kodiak station operator testified and his official record (Libelant's Exhibit 1) showed entries reflecting record of the fact that the submarine portion cable of the communications system was inoperative between Seattle ACS headquarters and Fort Lawton and became so at some time after 3:00 P.M. Seattle time when the last contact was made and before 4:00 P.M. when discovered and recorded by the Kodiak station (R. 82-84, 92, 94, 95). The service was restored by alternative leased land line facilities. (R. 83, 96, 62-63). Clearly, the trial court

did not err in finding as it did in Findings of Fact VII, XIV (R. 15, 17) as contended by appellant in its Specification of Error No. 2.

5. Nor did the trial court err in excluding the 1958 issue of a harbor chart marked for identification as Respondent Exhibit A-11. This exhibit was excluded on the basis of appellee's objection that it was a chart of conditions existing 3 years later, immaterial and incompetent. This was discretionary with the court, the exercise of which certainly was not and could not have been clear error. Even accepting appellant's argument that the cable area could have been marked into deeper water, and for all that — its whole underseas length — this surely would not prevent damage at the hands of those who blissfully ignore those markings and warnings. Drawing lines on charts out into water of greater depth will hardly prevent fouling a cable laid within those lines in shallower water, and is hardly analogous with putting covers over vats as proof of ability to safeguard persons from falling into the vats. Thus, *Carstens Packing*, 186 Fed. 50 (C.A. 9, 1911) is hardly in point, nor is *The Georgie*, 14 F. 2d 98 (C.A. 9, 1926), which involved particular application of a California statute. Here, *contra* to *The Georgie* situation, appellant had clear, unequivocal warnings on the charts of the area and by the large warning sign posted, and more important,

appellant's captain well knew of the existence of the cable area. (R. 351-352)

II

THE TRIAL COURT ERRONEOUSLY LIMITED APPELLANT'S RECOVERABLE DAMAGES TO \$6,954.23.

The appellant urges, in Appellant's Specification of Error No. 4 (Appellant's Brief, page 19) that the trial court erred in finding that the appellee "proved damages in the sum of \$6,954.23, or in any other sum, and also erred in admitting and considering heresay evidence on the question of damages". The appellee agrees that the district court erred in fixing damages in this case, and further, urges that this court now increase the appellee's award of damages to the proper amount of \$8,937.50, as contended for in the pre-trial order (R. 10, 11) and as shown by the record.¹

¹ Appellee's right to seek greater relief than it was granted below is not dependent upon the hollow common-law formalism of filing a second notice of appeal, the entire record coming to the Court of Appeals upon the original notice filed by appellant. *Standard Oil Co. v. Southern Pacific Company and Davis*, 268 U.S. 146 (1925); *The John Twohy*, 255 U.S. 77 (1920); *Reid v. James C. Fargo*, 241 U.S. 544 (1916); *The Hesper*, 122 U.S. 256 (1887). For this purpose, the appellee has an absolute right to rely upon the appeal taken by appellant and not to file notice himself. *The John Twohy*, *supra*. In particular, the successful libelant, as appellee, whose award has been brought up for review as here, is entitled to point out to the appellate court an erroneous omission from the award, and to have it increased to the proper amount, as shown by the record. *Standard Oil Company v. Southern Pacific Company and Davis*, *supra*; and *The Hesper*, *supra*. Appellee has properly given notice of its contentions by its Statement of Points filed in the case and by its Specifications of Errors in this brief.

During the trial of this case in the lower court, the appellee elicited testimony from an expert cost accountant for the Alaska Communications System showing that the direct costs of repair to the A.C.S. telephone cable attributable to the break of March 21, 1955, amounted to \$6,954.23. (R. 161, 162, 185) The government's expert witness, Army Sergeant Charles B. O'Brien, who has had 20 years' experience in the accounting field as it pertains to public utilities (R. 150) explained on cross-examination that this figure included the sum of \$504.00 for depreciation, and \$188.20 for overhead, and that the direct out-of-pocket expenses for the cable repair job for the cable repair ship alone amounted to \$6,262.03. (R. 188, 189)

The government's cost accountant was unable to state what all the "out-of-pocket" expenses for the cable repair operation were; he did testify that the direct expenses he attributed to the cost of operating the cable ship BASIL O. LENOIR during the cable repair job did not include any costs relating to the preparation of the cable ship for putting to sea for the particular operation. Similarly, said direct expenses did not include the direct overhead expense for the operator of the cable ship, the Alaska Communications System. (R. 189)

In order to prove more adequately the damages accruing to the government as a result of the Fort Lawton-Seattle submarine cable repair in March of 1955, Sergeant O'Brien was questioned on direct examination as to his knowledge of the daily cost of operation of the cable ship LENOIR. He testified that in November, 1954, five months prior to the subject cable repair job, he prepared a cost analysis of the daily operational cost of the LENOIR which daily operational cost figure did not include any item of profit or loss. (R. 163, 164) The daily operational cost of operating the cable ship was \$1,500.00. (R. 164) Sergeant O'Brien prepared the cost analysis under orders from his commanding officer, for the purpose of determining the charter hire value of the vessel. (R. 166, 167) In arriving at the daily operational cost of the LENOIR, Sergeant O'Brien considered all items of expense necessary to operate this particular ship in a normal course of one day. (R. 170) These items included labor, fuel, oil, expendable supplies, depreciation, dry-docking, repairs and laundry. (R. 175) It also included the costs of preparing the cable ship for the repair job. (R. 194) Sergeant O'Brien detailed the source of his information concerning the computation of the various items thus included in his cost analysis. (R. 175-179) He prepared a subsequent cost analysis in May of 1955, two months after the subject

cable repair job, utilizing the same method of computation, and arriving at the same figure of \$1,500.00 as the daily operational cost of the repair. (R. 179-180) The May, 1955 computation covered all the period from the preceding computation in 1954, and was reviewed after each month's operation of the LENOIR. (R. 180)

Captain John Bowen, the Master of the cable repair ship, testified that according to Respondent's Exhibit A-3 which is the log book of the LENOIR, the cable repair ship commenced on 1100 hours of the 23rd of March, 1955, and was completed at 1000 hours on the 29th of March, 1955. This represented an elapsed time of 5 days, 23 hours, during which the cable ship was used on the subject cable repair job. (R. 247) Thus, the evidence clearly demonstrates damages in the amount of \$8,937.50, or \$1,500.00 per day for a period of 5 23/24 days.

The government's cost accountant witness testified at length concerning his computation of the daily operational cost of the cable repair ship, including the source of the various items upon which he relied in making his computation. (R. 175-181) Counsel for respondent in the court below moved to strike all the witness's testimony relating to the daily operational cost computation on the ground that it was not the best

evidence, but the court received it over objection as a summarized statement of the information obtained and testified to by the witness as to conclusions given by him as an expert witness in the field of cost accounting. (R. 181, 184-185) This was clearly within the discretionary authority of the trial court. See Wigmore, 3rd Ed., Vol. II, Sec. 561 and cases collected therein. And such discretion has been specifically sustained in permitting the opinion evidence of an accountant. *United States v. Miller*, (C.A. 2, 1932) 61 F. 2d 947, 950; see also 3 Benedict on Admiralty, Sec. 381 b (6th Ed), p. 7.

While the trial court did, as appellant's brief insists, finally reject libelant's Exhibit 3, which was a ledger sheet showing the cost accountant's tabulation of the direct costs of the cable repair job (R. 152, 161-162), the trial court also properly admitted and considered the cost accountant's expert oral testimony relating to the direct costs of the cable repair job and the daily operational costs of cable repair ship. (R. 181, 184-185)

Sergeant O'Brien's testimony with regard to damages was uncontradicted. This was the sole and only testimony in the matter, and was in the nature of expert testimony of the libelant's cost accountant and was accepted by the trial court as such. The ledger

sheet, ultimately rejected as Libelant's Exhibit 3, was painstakingly qualified as a record made in the ordinary course of business (R. 152-153) and as an official government record (R. 153) and was also qualified as being the best evidence (R. 154), matters probably overlooked or lost sight of by the trial court during trial.

Appellant's argument under the caption "Specification of Error No. 4", on pages 35-37 of appellant's brief, directs itself to the trial court's rejection of libelant's Exhibit 3, and contends that the trial court only considered "oral testimony of a hearsay nature as proving damages". Of course, the trial court did nothing of the sort. It simply and properly received the oral expert opinion of the government's cost accountant witness as to the cost of the cable repair job. The direct cost of operating the cable repair ship on the subject cable repair job was given as \$6,954.23, and the complete cost of said job, including the cost of preparing the vessel for the cable repair, as \$1,500.00 per day. The oral testimony of the witness as to the various items considered by him in arriving at his conclusions respecting the operating costs of the vessel, were offered, and accepted, not as tending to prove the truth or accuracy of those items, but simply as demonstrating the grounds for the witness's opinion. See Wigmore, 3rd Ed., Vol. II, Sec. 562, Sec. 655.

Appellant's argument thus fails for the reason that the testimony of Sergeant O'Brien was admitted, not as hearsay, but as the expert opinion of a qualified cost accountant. But even if this were not so, it is hard to understand appellant's curious reliance upon the hearsay rule, a common-law exclusionary rule which experienced admiralty counsel are seldom heard to assert. The technical common-law rules by definition do not apply to a civil law admiralty case, and the objection of hearsay in evidence goes only to the weight of the evidence. 1 Wigmore on Evidence, (3rd Ed.) Vol. I, Sec. 4d; 3 Benedict on Admiralty (6th Ed.) Sec. 381b; *The Estrella*, 4 Wheat. 298, 306, 4 L.Ed. 574, 576 (1819); *The Denny*, 127 F. 2d 404 (3rd Cir.); *The Rosalia*, 264 Fed. 285, 289 (2nd Cir., 1920); *The Orion*, 239 Fed. 301 (4th Cir., 1916); *Westchester Fire Ins. Co. v. Buffalo Housewrecking & Salvage Co.*, 40 F. Supp. 378 (1914) A.M.C. 1601 (W.D.N.Y.); *Hickman, Williams & Co. v. Murray Transp. Co.*, 31 F. Supp. 820 (1940) A.M.C. 550 (S.D.N.Y.); *The Boskenna Bay*, 22 Fed. 662 (S.D.N.Y. 1884); *The Vivid*, 28 Fed. Cas. 1234, No. 16,978 (E.D.N.Y. 1870); *The J. F. Spencer*, 13 Fed. Cas. 614 No. 7,315 (E.D.N.Y. 1869).

Cross-appellant submits that a fair analysis of the cost accountant's testimony in this case, together with the other evidence establishing the duration dur-

ing which the cable ship was exclusively engaged in Seattle-Fort Lawton cable repair job, compels a conclusion that the trial court erred in failing to allow cross-appellant damages based on the daily operational cost of the cable repair ship, and in limiting damages in the amount of \$6,954.23. Sergeant O'Brien's detailed testimony as an expert witness clearly established the daily operational cost of the cable repair ship at \$1,500.00 per day; the testimony of Captain John Bowen, Master of the cable repair ship, shows that the vessel was engaged on the Seattle-Fort Lawton cable repair job from March 23rd, 1955 through March 29th, 1955 (R. 247), and respondent's Exhibit A-3, the pilot house log book of the cable repair ship which was offered and admitted into evidence (R. 194-195) shows in detail that the ship was used exclusively during that period in repairing the cable break.

The trial court accepted Sergeant O'Brien's oral testimony as to the direct costs of the cable repair, which amount Sergeant O'Brien testified was found by him to be \$6,954.23, and awarded libelant below damages in that amount. The trial court rejected Sergeant O'Brien's oral testimony as to the daily operational costs in determining damages, presumably on the basis that such amount included costs which were not allowable, although the reason for the trial court's refusal to allow the indirect costs does not appear of record.

It is clear, however, that there was competent and sufficient evidence before the trial court to compel an award of damages based on the daily operational costs of the vessel in the amount of \$8,937.50. This figure represented the exact cost of operation of the cable repair vessel to the libelant during the cable repair job. Clearly, the expenses directly connected with the cable repair are recoverable damages, and the cost of operating the vessel during the repair operation is such a direct expense. The fact that the vessel would have been maintained by the government without respect to this particular repair job does not affect the cost of operation as an item of recoverable damages. The rule is clearly stated in *United States v. The John R. Williams*, (C.A. 2, 1944) 144 F. 2d 451, 453 (cert. den., 65 S.Ct. 271). Judge A. Hand, in delivering the opinion for the court, concisely stated the point:

“The appellant contends that the above three items all represent current expenses incurred by the government’s cable repair vessel JOSEPH HENRY when engaged in repairing Cable No. 555, that these expenses during the period of the repair work were a necessary cost of maintaining a vessel which it regularly kept for repairing cables. The appellant showed that the repairing of the cable, which was injured by the tug, did not prevent the use of the vessel for other repair work and, therefore, added nothing to the libelant’s necessary outlay. But, if the government had not maintained such a vessel it would have had to employ an outside contractor to make the

repairs. We can see no reason why the respondent, who caused the damage to the government's cable, should not pay the expense of the repairs while they were being made. Similar expenses were allowed by Judge Mack in the Commonwealth, D.C., 297 F. 651, and by the Circuit Court of Appeals of the Third Circuit in the *A. A. Raven*, 231 F. 380. See also *The L-1 (The Philadelphia)*, D.C., 10 F. Supp. 43; *The Conqueror*, 166 U.S. 110, 134, 17 S.Ct. 510, 41 L.Ed. 937. The decisions where recoveries have been allowed for the use of spare boats maintained for emergencies, though such boats might not have been otherwise used at the time, support the libelant's claim. (citing cases)"

Similarly, we cannot see why the respondent below, who caused the damage to the government's Seattle-Fort Lawton cable, should not pay the expense of the repairs while they were being made, nor why the cost of operating the cable repair vessel should not be allowed as such an expense.

It is respectfully submitted, that on the basis of the record in this case, this court should now award cross-appellant damages commensurate with the proof in the case in the amount of \$8,937.50.

SUMMARY

PRINCESS LOUISE attempted to dock without a tug under unfavorable conditions, proceeded to approach downwind dragging her anchor at the end of 180 feet of chain or more and, ignoring the known

cable area, was seen to drag the anchor in the vicinity of the cables in the marked and posted cable area. At or about the time of the attempt, appellee's cable service was disrupted, its submarine cable shortly thereafter found scored by the dragging of a heavy object, disturbed from its plotted and proper position, and freshly broken apart. Minimum repair requirements were accomplished using appellee's cable repair barge at an established per diem cost of \$1,500.00 per day for 6 days; certain direct expenses were also the subject of expert testimony and amounted to \$6,954.23, which was a lesser included figure in the contemporaneously derived per diem cost figure of \$1,500.00.

Cross-appellant defends and seeks increased damages largely on the facts which are extensively disputed by appellant in its statement and argument, and which therefore required cross-appellant's extended attention in the foregoing brief. A review of the record and testimony in this respect discloses the complete lack of merit in appellant's position; nowhere has it been shown, nor can it be shown, that the trial court's findings of fact were *clearly erroneous*. Conversely, it has been shown from the record, that the trial court erroneously determined the libelant's recoverable damages in the court below.

CONCLUSION

For the foregoing reasons hereinabove detailed the decree finding liability on the part of appellant should be sustained, correcting only the award to conform to the appellee and cross-appellant's proofs, allowing the per diem cost of operation of the cable repair ship for the completion of the cable repair in 6 days less one hour, at a cost to cross-appellant of \$8,937.50.

Respectfully submitted,

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United States Court of Appeals
For the Ninth Circuit

CANADIAN PACIFIC RAILWAY Co., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S REPLY BRIEF

BOGLE, BOGLE & GATES
THOMAS L. MORROW
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.



FILED

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CANADIAN PACIFIC RAILWAY Co., a corpo-
ration,

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UNITED STATES OF AMERICA,

Appellee.

No. 16334

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S REPLY BRIEF

QUESTIONS PRESENTED

It would be inappropriate to consider any question raised by appellee's specification of errors as appellee took no appeal. An appeal may be instituted only by filing with the District Court a notice of appeal. Rule 73, subdivisions (a) and (b), 28 U.S.C.A. The rule applies to cross-appeals in admiralty. *International Milling Co. v. Brown Steamship Co.* (2d Cir. 1959) 264 F.(2d) 803.

The primary question presented is one of liability of the owners of the S.S. PRINCESS LOUISE for damage to appellee's Seattle-Fort Lawton submarine cable.

It is appellant's position that the question of liability is to be determined by the evidence as to where

the submarine cable broke and where it was damaged. Was the submarine cable broken or damaged at a point or place within a marked or an unmarked cable area? Other subordinate questions are as follows:

1. Did the government prove that the submarine cable broke during the maneuvers of the PRINCESS LOUISE between 2:45 p.m. and the time she docked at 3:48 p.m.?

2. Did the trial court err in excluding a 1958 U.S.C. & G.S. Chart No. 6446, being respondent's Exhibit A-11 offered for the purpose of showing the feasibility and the practicability of the government marking thereon the location of the previously unmarked part of Seattle-Fort Lawton submarine cable?

3. Did the trial court err in admitting and considering hearsay evidence on the question of damages?

We are mindful of the rule that clear error must be shown by the appellant to gain a reversal and with this rule in mind, make reply to the brief of the appellee, which will, we feel, assist this court in gaining a clear perception of the grievous errors of the trial court in its findings.

REPLY TO APPELLEE'S COUNTER-STATEMENT OF CASE

The appellee states, page 4, Brief, that the south side of Pier 64 where the PRINCESS LOUISE docks "is 800 feet north of the red line stub extending out from the shore to deep water and indicating the shoreward cable area within which appellee's submarine cable lay,"

relying on the United States Coast & Geodetic Survey Chart, respondent's Exhibit A-1.

We measure the *closest distance* to be *900 feet*. The distance between the two positions *along the pier line* is 1,200 feet. The distance along the pier line from the south side of Pier 64 to in between Pier 56 and 57 where the Fort Lawton cable comes out of the sea wall is 1,800 feet. IMPORTANT: *The position of the break in the cable designated by a small blue circle on respondent's Exhibit A-1 as "Seattle broken end" in an unmarked cable area is approximately 2000 feet west and north of the point on the red stub line where appellee measured 800 feet to Pier 64. The position where the break occurred and where any damage appeared on the submarine cable is unmarked on the chart. Respondent's Exhibit A-1.*

The appellee, pages 3 and 4 of Brief, states, referring to observations of Captain Langworthy, a disinterested witness, "During these maneuvers she was seen to have her starboard anchor on the bottom and dragging * * * " *But this was after the PRINCESS LOUISE was close to her own CPR dock, Pier 64!*

A critical examination of these "observations" indicates that the CPR boat's southernmost portion of her approach was Pier 59 (R. 102) where she made a turn to the left (R. 102) and "headed toward Pier 64, after it made its initial turn" (R. 103) and the witness stated "she had her hook down, her anchor (R. 103). He did not see her anchor drop (R. 107) and the PRINCESS LOUIS *was backing when he observed her anchor chain "off the face of the pier," Pier 64 (R. 122, 123).*

Clearly the PRINCESS LOUISE was not within any *marked* cable area at the time of the witness' observations, but she could have been over the Fort Lawton cable in an *unmarked cable area* (Respondent's Exhibit A-1).

True, as appellee says at page 4 of the Brief, the same witness observed that the PRINCESS LOUISE had scope on her chain which would indicate the anchor was on the bottom (R. 103, 107-108), but during this observation *the PRINCESS LOUISE was backing*, "she was backing" off and away from Pier 64 and being blown northerly (R. 122-123) and making sternway, possibly over the *unmarked* Fort Lawton cable (Respondent's Exhibit A-1). The witness testified that the PRINCESS LOUISE was "approximately" 50 feet off Pier 64 when asked to state his best estimate of the PRINCESS LOUISE off Pier 64, "when you saw her anchor chain as though she was dragging her anchor" (R. 125).

The appellee concludes (Brief, p. 4) "thus, SS PRINCESS LOUISE, at some time during the hour preceding 3:48 p.m., her docking time, was seen over the cable area off Pier 57 *and northward*" (R. 102, 105, 42, 43, 51, 57). The references R. 102 and 105 refer to Captain Langworthy's testimony as above noted, that is, when the PRINCESS LOUISE was backing off of Pier 64 when he saw her anchor chain as though she was dragging her anchor (R. 125). The PRINCESS LOUISE was indeed northward of Pier 57. This witness said that the PRINCESS LOUISE did not go further south than Pier 59 and her anchor chain did not show scope until she was within 50 feet of Pier 64 (R. 102, 103, 124, 125).

Then she backed possibly into the *unmarked* Fort Lawton cable area as illustrated by the witness between "P-1" and "P-2" marked on the chart (Respondent's Exhibit A-1, R. 125, 126).

The references R. 42, 43, 51, 57 have to do with the testimony of Col. George F. Rogers, making allowances for his self-serving conclusions, he saw exactly what Captain Langworthy saw. He testified he "could see out of the window of the fifth floor of the Federal Office Building that this PRINCESS ship was having trouble docking" (R. 38) "*at the CPR Dock*" (R. 39). When he "*first noticed*" the CPR ship she was "Just off the CPR Dock. She was part—she overhung the dock somewhat" (R. 40) — that *when he first observed her starting to back*, she was "*down next to her own dock, the CPR Dock*" (R. 50). "I saw her first relatively parallel to her dock" (R. 51). He observed the PRINCESS LOUISE "come back from her own Pier about two ship lengths" (R. 49), "two or three, I said" — that would be 600 or 900 feet. According to Col. Rogers, she backed "generally towards West Seattle (R. 51) — that would be *southwest*" (R. 51). Pier 57 is *southeast* of Pier 64. The direction toward West Seattle or southwest from Pier 64 takes her not toward Pier 57, but away from Pier 57, and toward the unmarked cable area where the Fort Lawton cable lies (Respondent's Exhibits A-1 and A-9). When asked what the PRINCESS LOUISE was doing at the time he saw her anchor dragging, he replied she was backing (R. 51).

He testified "The PRINCESS LOUISE when I first saw her was up at the CPR dock * * * and she come and

moved back over our cable area,” and he said, “*I would put the ship 600 YARDS off my office after it got into the cable area*” (R. 43). He likewise estimated it was 400-500-600 YARDS between his office and the CPR dock (R. 47, 48). In other words, the ship was the same or a greater distance away from his office than the CPR dock and NOT in a *marked cable area* (Respondent’s Exhibit A-1). Actually the CPR dock is 1,000 YARDS from Rogers’ office (Respondent’s Exhibit A-9). The ship being the same 1,000 YARDS or even a greater distance away than the CPR dock, according to estimates of Rogers, was in an UNMARKED area. *This area is UNMARKED for any cable* (Respondent’s Exhibit A-1). NEVER did the witness identify the PRINCESS LOUISE as being within the *marked cable area*. The witness no doubt was referring to an *unmarked* cable area in which the Fort Lawton cable rested. He confirmed that the Fort Lawton cable did not proceed due west in the Fort Lawton cable area as marked on the chart. He testified “that the cable runs down alongside the pier (Pier 57) and swings out toward Fort Lawton (north)” (R. 55). When asked if he was referring to “the actual cable area marked on the chart,” he said “No. I was referring to the area out off of the pier (north) that our cable run in” (R. 55). The actual coordinates on the chart, he did not know what they were (R. 55).

The appellee (Br. 5) states “The depth in the cable area vicinity where she was seen and where she turned in, swinging left and closing inshore in her approach, was less than the reach of her anchor.”

As noted above, the PRINCESS LOUISE was NEVER observed in a MARKED cable area and there is *no* evidence her anchor was out before she got close to her own pier. She may have backed into an *unknown* and *unmarked* cable area. The Fort Lawton cable swings north outside the boundaries of the marked cable area into an unmarked area (Respondent's Exhibit A-1) and follows along a 160-180-foot depth curve (Respondent's Exhibits A-1 and A-10), *which previously unmarked cable area was subsequently marked* (Respondent's Exhibit A-11).

Appellee states page 5 of his Brief, "Communications had been routine until it was lost after 3:00 p.m. on March 21, 1955, when the last contact was had with Adak (R. 79-81) and was found inoperative at 4:00 p.m. when Kodiak could not get through to Seattle" (R. 82-84).

Appellee's statement is not a correct statement of the evidence. The communications were not lost between 3:00 and 4:00 p.m. on March 21, 1955. The radio at 3:00 p.m. and 4:00 p.m. was simply released by the Kodiak station to the Adak station (R. 90, 92). In fact, the government witness admitted that there was no indication to him that the service was blocked between 3:00 and 4:00. He testified "It *would not* indicate to me that the service was lost between 3:00 and 4:00 o'clock" (R. 91). The only disruption of service established was after the PRINCESS LOUISE tied up to the dock at 3:48 p.m. The government witness testified "I can only indicate that the line was out from 4:05 p.m. to 4:20 p.m. That is the only time that I can indicate it

was out, from my station" (R. 93). Even at that, he "didn't know" and "wouldn't know" that the trouble was on the submarine cable (R. 93).

The appellee states that the per diem cost of operation of the LENOIR was established at \$1,500 per day, relying on the record at page 164. The trial court did not accept this evidence as it was mere conclusion of an accountant based on a study in October, 1954 (R. 164), and represented rather not the daily cost but what the ship would be chartered for on a daily basis to a commercial concern (R. 191) to go to Alaska (R. 196), and the evidence was stricken by the trial court (R. 192) against which action no appeal was taken by appellee.

The evidence of direct costs, \$6,954.23, of course, was hearsay to which objection was timely taken and from which appellant appeals, appellant's opening brief (R. 19).

REPLY TO APPELLEE'S ARGUMENT

The appellee states, page 8 of Brief:

"The position of the SS PRINCESS LOUISE in the cross-appellant's cable area was clearly fixed by the evidence. * * * "

" * * * He (harbor patrolman Langworthy) stated on direct examination (R. 102) that she turned left towards the piers in the vicinity of piers 59 and 57, approximately a *tenth of a mile* off the pierhead line and farther south than he was accustomed to see her maneuver. (R. 102, 103)."

Actually, the witness testified " * * * she came in on her regular course with the exception of the last por-

tion, and she went farther south than usual * * * ” (R. 101). During the *southernmost position* of her approach: “the CPR boat could have been as far as Pier 59” (R. 102). “Yes, it made a *slight turn* as it approached” (R. 102). *Her turn* “would be to the left as it approached toward the piers, *this is off the pierhead line, approximately a tenth of a mile*, and like I say, it was farther south” (that is as far south as Pier 59) (R. 102). “At that time (time of slight turn) I believe it *would have been headed toward Pier 64*, after it had made its initial turn. *This turn is not a very pronounced turn, but it is a turn of normal course that it always takes*. In this case the ship itself was farther to the south this day than usual, *but it still made its turn*” (R. 102). Again he testified the PRINCESS LOUISE made her *slight turn* at Pier 59.

“Q. Off what pier was it when it made its turn farther to the south?

A. I would say Pier 59, or within that vicinity.” (R. 103).

The reference to being a tenth of a mile, 600 yards, off the pierhead line is consistent with Captain Campbell’s testimony that he was 3 to 4 cables (600-800 yards) off the wharf (Pier 64) when the vessel was on a Southeast course (R. 358) which placed him $4\frac{1}{2}$ cables (900 yards) away from Pier 57 when he made the turn in relation to Pier 64 and 63 (R. 349). (Respondent’s Ex. A-1).

The appellee says, page 9 of brief—

“The witness described observing that the PRINCESS LOUISE’s starboard anchor was down at

this time and that the anchor was dragging is demonstrated by the angle at which the chain extended from the hawse on the bow of the ship.” (R. 103, 104, 107).

The witness observed the anchor was down but not at the time the PRINCESS LOUISE made her turn. The witness was asked what he observed during *any maneuvers* and testified “she had her hook down” (R. 103) and noticed “there was scope on the anchor chain” (R. 104), but he “did not see her anchor drop” (R. 107).

On cross examination the witness clearly indicated that when he saw the anchor was down and dragging it was when the vessel was backing away from Pier 64 after making her turn at Pier 59. The witness observed the anchor chain with scope on it “from the bow to the anchor chain” (R. 122) while “she was backing” (R. 122) and when “she was right off the face of the pier (Pier 64)” being blown to the north (R. 122, 123). Capt. Campbell testified: The starboard anchor of the PRINCESS LOUISE was first lowered 15 fathoms and then dropped to 30 fathoms *when she was coming in on a line between the CPR Dock and Pier 63*, about 900 feet from the southwest corner of Pier 63 (R. 325). The “last 15 was close in to our wharf (Pier 64)” (R. 344).

The appellee says (Br. p. 10), “The red line in positions ‘P-1’ and ‘P-2’ on Respondent’s A-1 were the witness’s estimate of her position *after* the southerly approach, dragging anchor, and reflect her backing (R. 124, 125) out of the mess she got into by her negligent attempt to approach downwind without aid of a tug.”

The PRINCESS LOUISE was being navigated cautiously by an experienced master and the unjustified remarks have no relevancy or connection with the preceding statement of evidence. Capt. Langworthy was asked: "What is your best estimate of the position of the PRINCESS LOUISE off 64 when you saw her anchor chain as though she was dragging anchor?" He replied: "Approximately 50 feet." He was then requested to mark the position "P-1" on Respondent's Exhibit A-1 (R. 125). He then indicated her sternway and leeward course as she was blown north broadside to the wind and marked the end of that course "P-2" on the chart (R. 126). *There is no evidence of the PRINCESS LOUISE dragging her anchor during her southerly approach as appellee might seem to infer.* Mind you this is a disinterested government witness who restricts the dragging of the anchor to the vicinity of Pier 64 in an UNMARKED area after the first approach of the PRINCESS LOUISE. The positions "P-1" and "P-2" on respondent's Exhibit A-1 demonstrate the probability that the PRINCESS LOUISE hooked the Fort Lawton cable in its unmarked position.

Appellee states, page 10 of its brief: "The witness corrected a brief impression created by appellant's cross-examination, that the anchor had been observed for the first time when dragging only some 50 feet off Pier 64; *he stated he observed this earlier when she was heading southerly and began to change her course and swing around to head for Pier 64 (R. 127).*"

On this point the witness said that the earliest time he recalled seeing the anchor chain was "*shortly after*

she changed course and headed towards Pier 64" (R. 127). He did not say he observed the anchor chain *when she was heading southerly* and began to change her course.

The appellee relies upon Col. George F. Rogers for his observations—"Seeing the PRINCESS LOUISE in the vicinity of Pier 57 and the 'cable area'—two ship-lengths off Pier 57"—or 600 feet, alleges that "cross-examination confused the witness." Appellee's brief, page 11. Only Col. Rogers' conclusions were confusing and misleading. His observations create quite a different story. *He observed the anchor chain dragging only when the PRINCESS LOUISE backed out from Pier 64, backing to the Southwest two or three ship lengths.*

Col. George F. Rogers is understandably an interested witness for the government, whose testimony bears close scrutiny in order to get at the unvarnished truth of his observations.

Out of his office window on First and Madison he saw the PRINCESS ship was having trouble docking (R. 38) at the C.P.R. dock (R. 39, 40). She backed down * * * and had an anchor dragging at that time (R. 39). "That's the end of what I observed" (R. 39). Now we have left out of the witness's testimony "She backed out down towards our cable area," (R. 39) because that is a mere conclusion. On leading questions he testified the PRINCESS LOUISE moved toward the vicinity of Pier 57 (R. 41) to about two ship lengths off, which we discount entirely because *Pier 57 is Southeast* of the Princess wharf, Pier 64, and the witness subsequently testified *she backed Southwest* from Pier 64

which would take her away from Pier 57, particularly while she was making leeway with a Southeast wind blowing on her broad side. He saw her first relatively parallel to her dock then she backed from her own pier two or three ship lengths (R. 49, R. 51) and backed in the direction of West Seattle or Southwest (R. 51).

We discount the distance the witness estimated off Pier 57, first because his observations indicate she did not move in that direction, secondly, because backing two or three ship lengths out from Pier 64 would take her even further away from Pier 57, and thirdly, because the witness observed that when the PRINCESS LOUISE was in what he described as "our cable area" after backing down from Pier 64, she was at least the same or a greater estimated distance away from his office than the C.P.R. Dock. For example: He variously estimated the distance from his office to the C.P.R. Dock, Pier 64, at 400 yards, 500 yards and 600 yards (R. 47, R. 58). He estimated the PRINCESS LOUISE 600 YARDS off his office after she got into the cable area (R. 41, 43). *Actually the distance from his office to the end of the C.P.R. terminal, Pier 64, is 1000 YARDS* (Respondent's Exhibit A-9). If the 500 yards estimate to the C.P.R. Dock becomes 1000 yards, then the 600 yards estimate to the PRINCESS LOUISE becomes 1200 yards. Well, that places the ship closer to the place where the cable was broken in an UNMARKED AREA.

This makes Rogers' testimony jibe with that of Capt. Langworthy who likewise saw the PRINCESS LOUISE drag anchor backing out from Pier 64 and be-

ing blown north put her in an UNMARKED AREA. (Respondent's Exhibit A-1) (R. 125, 126).

The appellee states (page 12 of Brief)—“That the cable was properly laid within the marked area shown on charts in general distribution and use by mariners was also clearly shown by the testimony of Captain John Bowen, Master of the cable repair ship *LENOIR*. (R. 232, 285, 287, 306, 318).”

This statement is only partially correct for it does not take into account the fact the cable was damaged in an unknown and unmarked cable area.

Respondent's Exhibit A-1 shows the bearing of the cable *as authorized*, being marked “282° 49’—proposed ACS cable,” originating in a marked cable area and extending westerly into deep water of 197 feet, 239 feet, etc., originating as it were between Piers 56 and 57. Note there is a margin of safety between the bearing or cable as authorized and the red stub indicating a cable area extending south from alongside the southerly side of Pier 58. See also War Department Permit, Libellant's Exhibit 5.

Respondent's Exhibit A-1 *also shows* the ACS cable by red marks plotted by Captain Bowen as relocated in 1953. *It has not one but four bearings deviating from the authorized bearing 282° 49’ and veering northerly in an UNMARKED AREA*, cutting as it were, the red stub marking the northerly boundary of the marked area on the chart. What is more, the relocated cable outside the market area extends *not into deeper water* as it would if located along the authorized bearing. *Instead the cable as relayed in 1953 is at 160-180 feet*

deep in an unmarked area (Respondent's Exhibits A-1, A-5 and A-10, and Libelant's Exhibit 5). See also pilot house log 1953 of the cable ship LENOIR, Exhibit A-6. The master of the cable ship LENOIR plotted the 1953 coordinates showing the relocation in an unmarked cable area on Respondent's Exhibit A-1 (R. 286-287).

As stated by appellee, the red stub on the chart (Respondent's Exhibit A-1) marking the northerly boundary of the *marked* cable area extends nearly 600 yards from shore, 580 yards to be exact, according to the Government's witness (R. 142)—that is, 1,640 feet; appellee cites the direct evidence of Stanley H. Christensen, cable foreman, to show that 1,500 feet were picked up and noted "in fairly good condition, but from then on I observed that something had been dragging along the cable and had scuffed the outer jute * * * " (R. 220).

As 3,450 feet (R. 222, 298) were picked up, this would leave 1,950 feet of cable damaged by ship's anchor before it broke which in itself sounds quite incredible. On cross-examination the extent of this damage was reduced by the witness working from the other end of the cable. When questioned by the court, the witness said the length of the cable he observed to be damaged was 1,500 feet (R. 226).

"COURT: The length of the cable damage was about a thousand feet, is that right?

A. No, sir, I'd say 1,500 feet * * * ." (R. 226)
Thus, the 1,500 feet deducted from 3,450 feet of cable to the break leaves 1,950 feet of unmarked and un-

damaged cable. As the marked cable extended 580 yards out from the sea wall, or 1,740 feet, the witness' answer to the court's question admitting only 1,500 feet of cable was damaged, places the marks the witness saw on the cable beyond the marked cable area. The witness, however, added another 200 feet thereafter and made the damaged part of the cable 1,700 feet (R. 228), but still the markings on the cable would be at least 50 feet beyond the marked cable area *where the cable was supposed to be*, in deep water beyond the reach of an anchor swinging at 180 feet. The witness ended up with three different results so far as damaged cable was concerned, 1,950 feet, 1,500 feet, and 1,700 feet, and at the end of the court's interrogation the court remarked "I have less information than I had before the witness took the stand" (R. 227). There is no showing that the cable was not so marked as testified by the witness, prior to the 1955 casualty, and at the time it was replaced there in 1953. The appellee failed to produce any damaged cable for measurement or inspection. On the other hand, *the cable account of operation No. 144-L appearing on page 9 of the 1955 deck cable report of the cable ship LENOIR, shows 2,930 feet of cable salvaged on the operation and 2,930 feet of cable returned to the dock*. Respondent's Exhibit A-4. *This means that only 520 feet of cable was marked or damaged by a ship's anchor.*

While the salvaged cable of 2,930 feet contradicts the foreman's testimony (not accepted in any event by the trial court), it supports the testimony of the foreman's boss, the master of the cable ship LENOIR, *who testified to 500 feet of damaged cable* (R. 241, 255)

and who concluded that a ship's anchor had hooked the cable and dragged it along a distance and then broken the cable (R. 242). From the experience of Capt. Bowen of the cable ship LENOIR in the repair and laying of cables, *the position in which the broken end was logged aboard is the closest measurement to that (the) position the cable was hooked or contacted by any dragging object* (R. 306, 307). This position is marked on Respondent's Exhibit A-1 by Capt. Bowen, by a small blue circle designated by a blue spear and label "Seattle broken end." Note this is in an unmarked area. According to Capt. Bowen the break was 450 yards (we make one-quarter of a MILE by measurement) from the closest marked cable area on the chart (R. 293).

The foreman, Christensen, did not attribute greater damage along the length of the cable specifically to the 1955 casualty. A similar repair was performed in 1953 (R. 31) but closer to shore where the cable was parted at the manhole at the sea wall. See page 1 of 1953 cable report of the cable ship LENOIR under entry of 1400 for 5 February, 1953, covering the inspection by Capt. Bowen and Mr. Christensen (Respondent's Exhibit A-5). This 1953 cable report shows at 1520 on 6 February, 1953, "P.U. (pick up) cable cut, 10 feet outside of sea wall." This cable was relaid by Capt. Bowen in 1953 (R. 231).

As Capt. Bowen attributed 500-600 feet of scuffing and damage as caused by the anchor of the PRINCESS LOUISE or some other vessel in 1955 (R. 309) and 2,930 feet of good cable was returned to stock out of a possible

3,450 feet, the evidence given by Mr. Christensen of marks on the cable for an additional thousand feet are of little significance particularly in view of evidence that the cable was damaged in 1953 at a point closer in to shore, and damage was of similar nature. There is the added possibilities the grapnel of the LENOIR scuffed the cable during the 1953 operation. A grapnel such as used by the LENOIR is a hook designed for fishing for cables on the bottom (R. 311). If such a grapnel were dragged lengthwise to a cable it would "progressively mark the cable more and more" as it progressed into deeper water (R. 312). The ADMISSIONS of Capt. Bowen and record of the 1953 cable repair and the unsatisfactory testimony of Christenson demonstrate the error in appellee's conclusions stated on page 14 of its brief that the damage observed as commencing 1,500 feet out from the sea wall conclusively establishes that the cable was hooked by the PRINCESS LOUISE's anchor well within the cable area.

Capt. Bowen has demonstrated conclusively that the Fort Lawton cable was hooked by a ship's anchor in an unknown and unmarked area in the vicinity of the position of the break marked "Seattle broken end" on the chart. Respondent's Exhibit A-1 (R. 269).

The flagrant and glaring error of the trial court was never more pronounced than in this case where it failed to consider the conclusive evidence brought out by appellant's cross-examination of the master of the cable ship, which established conclusively (1) that the break in the cable and any contact with an anchor occurred well outside any marked cable area and in an unmarked

area; and (2) that the cable was damaged because it had been relocated in 1953 in an unmarked cable area.

The appellee at pages 15 and 16 of its brief says that the negligence consisted of approaching the C.P.R. terminal up wind rather than coming alongside. The docking maneuvers and docking of the PRINCESS LOUISE, however, were accomplished without injury to passengers, crew or ship, and without damage to the dock, and by an experienced ship's master who had followed the usual practice in the face of a southwest gale (R. 322). The only negligence *that could have proximately caused* damage to the cable would have been the dropping or dragging of an anchor in a marked or known cable area. The cable area of the Fort Lawton cable after turning north outside the marked cable area, was unmarked and unknown to the mariners such as the master of the PRINCESS LOUISE. Absent any evidence the PRINCESS LOUISE dropped or dragged her anchor within the marked cable area, and absent evidence there was any damage to the Fort Lawton cable within the marked area, the charge of neglect of the master to make more observations, take soundings or maneuver without the use of a tug, not heaving the anchor before attempting to make the second approach, etc., become wholly immaterial.

The appellee states at page 17 of its brief—
 “That the PRINCESS LOUISE entered the cable area with her anchor dangling at the end of at least 180 feet of chain, on at least one occasion, is admitted by Capt. Campell, beginning at R. 358
 * * * .”

First, there is no evidence of an admission.

Appellee refers to the second approach. There is no evidence that the cable was displaced to the east or north which the drag of the cable by the anchor in that direction would have shown, hence appellee's point is of no significance. Besides, there is a satisfactory explanation of the evidence.

At the time of approaching the wharf (Pier 64) the second time before turning in, coming down to a position off Pier 64 the PRINCESS LOUISE was "heading down towards the end of the harbor with the Smith Building *on the port bow*, Smith Tower (R. 357). Very little way on ship at time — going straight ahead — headed in general direction, down harbor towards the Smith Tower about three or four cables off the wharf (Pier 64). Turned left toward Pier 64 — headed southeast when turning left and that would bring her in (R. 358) a general northeast (magnetic) direction."

There is nothing inconsistent with the foregoing testimony and the Captain's testimony of being $4\frac{1}{2}$ cables, 900 yards, off Pier 57 (R. 349).

Three cables or 600 yards off Pier 64 on a course southeast true with the Smith Tower on the port bow places the vessel approximately 900 YARDS off Pier 57. Four cables or 800 yards off Pier 64 on a course southeast true with the Smith Tower on the port bow places the vessel approximately 1,100 yards off Pier 57. The same southeast course, magnetic instead of true, and the distances the vessel was away from Pier 57 at the time are likewise about four and one-half cables or 900 YARDS. Incidentally, the depth of water 3 to 4

cables off Pier 64 on a course headed southeast is just west of the 239-foot depth sounding on the chart. Remember, the wind was moving the vessel north after the turn northeast in toward Pier 64 away from the marked cable area (Respondent's Exhibit A-1).

The appellee states (Br. p. 18):

“The record conclusively shows that the PRINCESS LOUISE was in the marked cable area *at the time* when the subject cable was broken.”

The record is devoid of any evidence the cable broke between 2:45 p.m. and 3:48 p.m. on March 21, 1955, when the PRINCESS LOUISE engaged in docking at the CPR Dock, Pier 64. The only evidence on this point was given by the Kodiak Station operator who admitted on questioning by the court that the only absolute blockage of the cable that he could prove by the record was from 4:05 p.m. to 4:20 p.m. (R. 93), that is, after the PRINCESS LOUISE docked.

Appellee contends it was discretionary with the court to exclude respondent's Exhibit A-11. This was illustrative of Capt. Bowen's admission that since 1955 the Fort Lawton cable area has been “marked to include the cable in its entirety from Fort Lawton to Seattle” (R. 315). Respondent's Exhibit A-11 shows the feasibility of marking the Fort Lawton cable and thus carry notice of the location of the cable to mariners such as the master of the PRINCESS LOUISE within the rule of the *Carstens Packing Co. v. Swinney*, 186 Fed. 50 (C.A. 9, 1911).

REPLY TO APPELLEE'S CLAIM FOR ADDITIONAL DAMAGES

The appellee took no cross appeal from either the court's rejection of evidence or the court's finding on the amount of damages, and hence this court has no obligation to consider appellee's specifications of error in respect thereto. *International Milling Co. v. Brown Steamship Co.*, 2 Cir. 1959, 264 F.(2d) 803. The authorities cited by appellee (Br. p. 20), were prior to the present Federal Rules of Civil Procedure and are not in point.

Appellee states, page 24 of brief:

“ * * * the trial court also properly admitted and considered the cost accountant's expert oral testimony relating to the direct costs of the cable repair job and the daily operational costs of cable repair ship.”

Appellee further states, page 25 of brief:

“ * * * The oral testimony of the witness as to the various items considered by him in arriving at his conclusions respecting the operating costs of the vessel, were offered, and accepted, not as tending to prove the truth or accuracy of those items, but simply as demonstrating the grounds for the witness's opinion.”

The appellee's cost accounting expert was a cost accountant by the name of Sergeant O'Brien (R. 149) who produced a ledger sheet (R. 152) marked Exhibit 3, prepared by him June 4, 1955 (R. 155), over two months after the casualty. It was prepared from an investigation made by accumulating costs of labor from individual time sheets (R. 161), from labor records, the

ship's records, and subsistence records (R. 162). The ledger sheet (Libelant's Exhibit 3) purported to be an official record of the Alaska Communications System (R. 163) and was first admitted in evidence (R. 163). Then the court changed its ruling and excluded Exhibit 3 (R. 184) with the statement — “ * * * If the witness has stated orally any information, the Court will consider that in connection with this case, * * * ” (R. 185). On cross-examination it appeared that Sergeant O'Brien included in his figure \$504 for depreciation, and \$188.20, or 15% for overhead (R. 188). The witness concluded from information furnished that the out of pocket expenses amounted to \$6,262.13 (R. 189). Specifically he said he prepared a cost analysis of the Seattle-Fort Lawton cable repair job in 1955 in the course of preparation of which *he found certain facts* which were included therein from which he concluded the costs were \$6,954.23. The figure arrived at was from labor records, the ship's records, and subsistence records which he audited on the job (R. 161-162) to which evidence there was a timely objection that it was hearsay evidence and not the best evidence (R. 161-162). Appellant specified error on the ground that the evidence was hearsay (Appellant's Br. p. 19, 35). The witness said: “These are direct costs” (R. 162). In other words, the witness in respect to these damages was not expressing the opinion of an expert on the amount of the direct costs but only that they were direct costs and the results of his computation. Direct costs were not proven by competent testimony. What he found to be direct costs was pure hearsay. What he had

obtained from the records or others was not of his personal knowledge. There appeared to be no necessity to rely upon this hearsay evidence of direct costs as the master of the cable ship was present in court and could have testified what costs were incurred. How many men were employed in the repairs? What was the hourly rate? What was the cost of materials? How much cable was charged to the job, and how much used? Was there any allowance made in expenses for salvage? The witness O'Brien had no personal knowledge of these matters and the truth therefore could not be reached by cross-examination of the witness. The master of the cable ship in the court room having first knowledge, and other Government employees, undoubtedly could have testified as to what the direct costs were, but did not.

The rule is stated in Volume II, Wigmore on Evidence, Third Edition, §657, as follows:

“§657. (a) *Knowledge must be founded on Personal Observation by the Senses, not on Hearsay.* The first corollary from the general principle of knowledge is what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses*, not from the reports of others — in other words, must be founded on personal observation.

“This general rule, to which contrary instances can be only casual exceptions, has long been recognized as fundamental:

“ * * *

“Upon this principle, the testimony of one claiming to have knowledge has constantly been

rejected when it appeared that he lacked personal observation.”

In *United States v. Aluminum Co. of America* (D.C., S.D. N.Y. 1940) 35 F.Supp., 820, the opinion of experts as to quality or quantity of bauxite in various foreign countries based on publications and statements of third persons, was held inadmissible. There the court laid down the following rule, at page 823:

“As I conceive, the law on the point may be briefly stated thus: Opinion testimony by an acceptable expert resting wholly or partly on information, oral or documentary, recited by him as gathered from others, which is trustworthy and which is practically unobtainable by other means, is competent even though the firsthand sources from which the information came be not produced in court. With respect to the matter, in what impresses me as unambiguous authoritative judicial language, it has been said that ‘the requisites of an exception of the hearsay rule’ are ‘necessity and circumstantial guaranty of trustworthiness.’ *G. & C. Merriam Co. v. Syndicate Pub. Co.*, 2 Cir., 207 F. 515, 518. In other words, when hearsay evidence is offered it is admissible if resort to it be essential in order to discover the truth and if the surroundings persuade the court that the information adduced by the expert as a basis of his opinion is reliable.”

On the point in question the court said, at pages 825, 826:

“ * * * As I see it, the effort of Alcoa is to introduce the opinion of an expert as to the quality or quantity of bauxite in various foreign countries where the sole evidence to show his knowledge of

the facts is publications and statements of third persons. While the line of demarcation is hard to draw with accuracy, under the circumstances recited, at least in the way the matter stands in the present record, I think there is nothing shown which is sufficient to constitute the proffered testimony an exception to the hearsay rule nor to bring it within the ground of necessity, which is one of the requisite underlying foundations of the exception sustained in the Merriam case.”

In the present case there is no reason shown why the government could not have produced a witness having personal knowledge of the payroll of the cableship and personal knowledge of the costs of the cable and other items of direct expense, and what is more, personal knowledge that those expenses were incurred on the job in question.

The rule is succinctly stated in Jones on Evidence, Third Edition, §376 as follows:

“Opinions Based Upon Hearsay—Conclusions of Law — Speculation. Although, as we have seen, the opinions of experts may in some cases be based upon personal knowledge gained from their own observation or examination, they cannot give in evidence opinions based upon information gained from the statements of others outside the courtroom, since in such case the opinions would depend upon hearsay. * * *

The case of *United States v. THE JOHN R. WILLIAMS*, (Cir. 2, 1944) 144 F.(2d) 451, is cited by appellant on page 28 of its Brief in support of its claim that damages should be increased and assessed on the basis of \$1,500

average daily operational costs, as determined by the cost accountant in an analysis made in October, 1954, and May, 1955. *The case supports no such theory for assessment of damages.* In that case, of \$1,918.67 damages assessed, \$724.70 were not questioned. The remainder, as determined by court commissioner, consisted of current items of expense during a repair period of 8½ days, being \$91.65 for fuel and water, \$236.25 for crew rations and \$866.07 for crew pay. Appellee here sought to prove similar items of costs and damages, and in addition, items of depreciation and overhead by its cost accountant, which proof failed because of its hearsay nature, and because the government failed to call available witnesses to properly prove direct costs. But what appellee is arguing for here is that damages should be assessed on the basis of a computation by an accountant as to the average cost of operating the cableship on a full-scale operation for laying cable, which cost analysis was made for the purpose of determining charter hire for commercial operation in Alaska on a daily cost basis (R. 192, 196).

CONCLUSION

It is respectfully submitted that the trial court committed clear error in respect to specifications of errors assigned by appellant in its opening Brief, and that the decree herein should be reversed and the case remanded

with instructions to enter a decree in favor of appellant,
dismissing the libel.

Respectfully submitted,

BOGLE, BOGLE & GATES

THOMAS L. MORROW

Proctors for Appellant
Canadian Pacific Railway Co.

No. 16335 ✓

United States
Court of Appeals
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

FILED

JUN 11 1959

Appeal from the United States District Court
for the District of Oregon.

PAUL P. O'BRIEN, CLERK

No. 16335

United States
Court of Appeals
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
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Portland, Oregon,
For Appellee.

In the United States District Court
for the District of Oregon

Civil 9266

DEWEY J. O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes Now the Plaintiff and for his cause of action against the above-named Defendant, alleges the following facts:

I.

This action arises under the Federal Tort Claims Act of June 25, 1948, 62 Stat. 933, as amended by Act of April 25, 1949, 63 Stat. 62, and Act of May 24, 1949, 63 Stat. 101; U.S.C., Title 28, Sec. 1346b, as hereinafter more fully appears.

II.

That at all times hereinafter mentioned, Plaintiff was a passenger in a 1954 G.M.C. Suburban panel truck, commonly referred to as a "crummy," owned and operated by one Dean Glen Thompson.

III.

That at all times hereinafter mentioned, U. S. Highway No. 58 was a public highway providing for one lane northbound and one lane southbound

at and near Hells Gate Bridge, between Westfir and Oakridge in Lane County, Oregon.

IV.

That at all times hereinafter mentioned, the lands adjoining and immediately adjacent to said highway, at a point approximately 200 yards north of said Hells Gate Bridge, on the East side of said highway was owned by the United States of America.

V.

That on November 13, 1956, at or about 5 o'clock P.M., the "crummy" in which Plaintiff was riding, driven by one Dean Glen Thompson, was traveling south on said highway approaching a point approximately 200 yards north on said Hells Gate Bridge. That at said point, a dangerous, dead snag fell from the land owned by the United States of America and immediately adjacent to said highway on the east, upon and striking said "crummy," and Plaintiff sustained severe permanent injuries as hereinafter described.

VI.

That at all times herein mentioned, it was the common, regular practice and duty of the employees of the United States Government to regularly inspect the Federal lands adjacent to public highways and to fall or otherwise remove dangerous snags which were known or ought to have been known to be dangerous to persons, including Plaintiff, who were using said highway. That Defendant's agents and employees failed to inspect and

failed to remove the aforementioned dangerous snag from the lands immediately adjacent to said highway. That prior to the accident mentioned herein, the dangerous condition of the aforementioned snag was brought to the attention of employees and agents of the United States Government by one Ed Roberts of Oakridge, Lane County, Oregon, and said agents and employees of the United States Government refused permission to the said Ed Roberts to go upon said lands and to remove said snag and said agents and employees of the United States Government did expressly refuse to remove said snag. That by reason of the foregoing, Defendants were negligent in one or more of the following particulars, to wit:

(a) In failing to remove said dangerous snag.

(b) In failing to maintain their property so as not to create a dangerous condition to persons using said U. S. highway, including Plaintiff.

(c) In failing to give permission to said Ed Roberts to go upon the land and to cut and remove said tree and hazard.

(d) In failing to inspect the lands immediately adjacent to said highway where said accident occurred at all or prior to said accident.

(e) In failing to warn Plaintiff at all or prior to said accident of the dangerous condition created by allowing the dangerous snag to remain.

VII.

That as the proximate result of the negligence of the Defendant in one or more of the particulars

hereinabove set forth, Plaintiff suffered severe personal injuries, including a compound comminuted, grossly contaminated fracture of the distal of the right femur, including damage to the nerves, muscles, ligaments, tendons and soft tissues of the right leg. That all of said injuries are permanent. That Plaintiff has been caused to suffer severe mental and physical pain. That at the time of the happening of said accident, Plaintiff was a well, able-bodied, robust man of the age of 35 years and capable of engaging in strenuous activities and labor and had a life expectancy under the Standard Mortality Tables of 33.44 years. That by reason of the foregoing, Plaintiff has been generally damaged in the sum of Fifty Thousand Dollars (\$50,000.00). Plaintiff has incurred the services of hospitals and doctors and medical expenses of the reasonable value of One Thousand Four Hundred Nine Dollars and Seventy-four Cents (\$1,409.74) at the time of the filing of this complaint. Plaintiff has suffered the loss of earnings of Three Thousand Six Hundred Seventy-five Dollars (\$3,675.00) at the time of the filing of this complaint and will lose further wages and will incur further medical expenses and therefore Plaintiff alleges that he has been specially damaged in the sum of Five Thousand Eighty-four Dollars and Seventy-four Cents (\$5,084.74).

Wherefore, Plaintiff demands judgment against the Defendant in the sum of Fifty Thousand Dollars (\$50,000.00) general damages, in the sum of

Five Thousand Eighty-four Dollars and Seventy-four Cents (\$5,084.74) special damages and for his costs and disbursements incurred herein.

THOMPSON & SAHLSTROM,

By /s/ WILLIAM P. THOMPSON,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed July 12, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Robert R. Carney, Assistant United States Attorney, and for answer to the complaint on file herein alleges:

First Defense

The complaint fails to state a claim against the Defendant upon which relief can be granted.

Second Defense

The Court lacks jurisdiction of the subject matter of the cause, in that the facts alleged in the complaint constitute a discretionary function within the meaning of the exception set forth in 28 USC 2680(a) to the jurisdiction conferred upon the Court by the Federal Tort Claims Act.

Third Defense

1. Defendant admits the allegations contained in Paragraphs I, II, III and IV with the exception that Defendant is informed and believes and therefore alleges that the subject roadway should be designated as "Old State Highway 58" and that the point in question is located 200 yards south of Hells Gate Bridge rather than 200 yards north of the same.

2. The Defendant denies the allegations contained in Paragraphs V, VI and VII of the complaint, and particularly denies that the Plaintiff was damaged in any sum whatever.

Fourth Defense

That the personal injury to Plaintiff as alleged in his complaint was not caused by the negligent or wrongful act or omission of any employee of the United States of America while acting within the scope of his office or employment.

Fifth Defense

1. That the government lands upon which the tree referred to in Plaintiff's complaint was growing are located in a rural area and are part of the Willamette National Forest, and said tree was not planted by the Defendant or its predecessors in title.

2. That "Old State Highway 58" referred to in Plaintiff's complaint was constructed pursuant to

a cooperative agreement entered into between the Federal government and the State of Oregon which imposes the duty to maintain said roadway upon the State of Oregon.

Wherefore, Defendant having fully answered Plaintiff's complaint herein, prays that the Plaintiff take nothing by his action and complaint be dismissed and held for nought, and that the Defendant be given judgment for its costs and disbursements incurred herein.

C. E. LUCKEY,

United States Attorney for
the District of Oregon;

/s/ ROBERT R. CARNEY,

Assistant United States Attorney, of Attorneys for
Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed October 17, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause came on before the undersigned Judge of the above-entitled Court on the 21st day of April, 1958, for pretrial conference, the Plaintiff appearing by E. B. Sahlstrom, his attorney, and the Defendant appearing by C. E. Luckey, United States

Attorney for the District of Oregon. With the consent of the Court, the following were stipulated as:

Agreed Facts

I.

That this trial proceed first on the segregated question of liability.

II.

That this action is commenced under the Federal Tort Claims Act of June 25, 1948, 28 USCA 1346(b) and 28 USCA 2674.

III.

That on November 13, 1956, the Plaintiff was a passenger in a 1954 GMC Suburban Panel Truck, commonly known as a "crummy," owned and operated by one Dean Glen Thompson, on a public highway extending between the communities of Westfir and Oakridge in Lane County, Oregon.

IV.

That on November 13, 1956, at a point on said highway near the Hell's Gate Bridge between Westfir and Oakridge in Lane County, Oregon, a snag fell from the forest lands immediately adjacent and adjoining said highway and owned by Defendant upon and striking the "crummy" in which Plaintiff was a passenger.

V.

That the Defendant did not inspect the snag prior to the accident of November 13, 1956.

Plaintiff's Contentions

The Plaintiff contends and the Defendant denies:

I.

That on November 13, 1956, while Plaintiff was riding in a "crummy" in a generally westerly direction on old U. S. Highway No. 58 between the communities of Oakridge and Westfir and at a point on said highway near Hell's Gate Bridge, a dangerous, dead, decayed, punky snag located on the real property of the Defendant fell from said lands and onto and over the "crummy" in which Plaintiff was riding along said public highway, causing Plaintiff severe personal injuries, as hereinafter described.

II.

That said dangerous snag was at all times prior to said accident clearly visible from said public highway and numerous employees and agents of Defendant, including Forest Service personnel and others, regularly traveled along said highway opposite the point where said snag was located and either knew or should have known of its presence, its dangerous characteristics and that it was capable of causing severe bodily harm to persons using said public highway and other persons in and about the area. That the public highway at the point where the accident occurred was a heavily traveled thoroughfare and that numerous residences, businesses, tourist facilities and a parking area were provided and maintained all in close proximity and the members of the public were invited by the De-

fendant to hunt, to fish and to hike in and over its lands, including the area where the accident occurred and from which the tree fell. That Defendant failed to inspect the lands and the dangerous snag at all or prior to said accident, failed to remove said dangerous snag and failed to give any or adequate warning to members of the public, including Plaintiff, of the danger created by allowing said snag to remain adjacent to said public highway.

III.

That by reason of the foregoing Defendant was negligent in one or more of the following particulars, to wit:

(a) In failing to inspect the dangerous snag and its lands immediately adjacent to said highway where said accident occurred at all or prior to said accident.

(b) In failing to warn Plaintiff at all or prior to said accident of the dangerous condition created by allowing the dangerous snag to remain in close proximity to the public highway.

(c) In failing to remove said dangerous snag at all or prior to said accident.

(d) In allowing a dangerous condition to exist on its lands, to wit: a dangerous dead, rotted, punky snag of great height and weight located on a steep hill at a point near the excavation, cut and grade of the highway, in close proximity to the public highway when they knew or should have known that said dangerous condition could readily cause bodily

harm to members of the public, including the Plaintiff.

IV.

That as a proximate result of the negligence of the Defendant in one or more of the particulars hereinabove set forth, Plaintiff suffered severe personal injuries, including a compound comminuted, grossly contaminated fracture of the distal end of the right femur, including damage to the nerves, muscles, ligaments, tendons and soft tissues of the right leg and a shortening of the right leg. That all of said injuries are permanent. That Plaintiff has been caused to suffer severe mental and physical pain. That at the time of the happening of said accident, Plaintiff was a well, able-bodied, robust man of the age of 35 years and capable of engaging in strenuous activities and labor and a life expectancy under the Standard Mortality Tables of 33.44 years. That by reason of the foregoing, Plaintiff has been generally damaged in the sum of Fifty Thousand Dollars (\$50,000.00). Plaintiff has incurred the services of hospitals and doctors and medical expenses of the reasonable value of One Thousand Nine Hundred Ninety-nine Dollars and Sixty-seven Cents (\$1,999.67), and will incur further medical expenses. Plaintiff has suffered a loss of earnings of Eleven Thousand Five Hundred Fifty Dollars (\$11,550.00), and therefore Plaintiff alleges that he has been specially damaged in the further sum of Thirteen Thousand Five Hundred Forty-nine Dollars and Sixty-seven Cents (\$13,549.67).

Defendant's Contentions

I.

That Defendant, its agents and employees owed no duty to the Plaintiff to protect him from the type of accident alleged herein under the circumstances alleged.

II.

That the Defendant was not negligent in any particular herein nor was any agent or employee of the Defendant negligent herein.

III.

That the Court lacks jurisdiction of this cause because failure to provide for inspection of roadside rural property for hazards to the traveling public would involve the exercise of a discretionary function.

IV.

That the highway on which the accident allegedly occurred was a public highway controlled and maintained by the State of Oregon in an area of rural forest land.

V.

That it was the custom and practice of the agents of the Oregon State Highway Department in connection with maintenance of the Willamette Highway known as Highway 58 and the highway on which the snag fell, which was generally known at the time of the accident as "Old Willamette Highway 58" after the previous re-routing and relocating of Highway 58 near this point, to request non-

mission to remove trees from the land of the Defendant adjoining said highway, which were considered by the said agents of the Oregon State Highway Department to constitute a hazard to the road or to the public traveler thereon, and for the agents of the Defendant to grant such permission upon request.

VI.

That the United States has not provided funds for the foresters supervising rural forest lands to inspect lands adjoining roads maintained by state agencies or for the removal of potential hazards to those traveling on such roads.

VII.

That no permission had been sought by the State agents or anyone else to cut the snag in question.

VIII.

Defendant denies Plaintiff's contentions except as they may be admitted by Defendant's contentions. Plaintiff denies Defendant's contentions.

Issues of Fact

I.

Was the Defendant negligent in one or more of the particulars charged?

II.

If so, was such negligence a proximate cause of the injury claimed by Plaintiff?

III.

What is the nature and extent of the injuries suffered by Plaintiff and how much has he been damaged thereby? (Segregated.)

Issues of Law

I.

Was there a duty on the government of the United States, as abutting landowner, to inspect rural trees in their natural state adjoining a public highway?

II.

Was there a duty to the traveling public on the part of the United States, because of its relationship with the road?

III.

Was there any negligence on the part of any agent or employee of the United States of America, Defendant, proximately causing Plaintiff's alleged injuries?

IV.

Was the duty to the traveling public, of which the Plaintiff was a member, if any duty existed under the facts alleged herein, that of the officials or agency charged with maintenance of the highway, i.e., the State Highway Department of the State of Oregon, and not the United States?

V.

Was the failure to provide for inspection of the roadside rural property for hazards to the traveling

public, a discretionary function resulting in this action being excepted from the consent of the United States to be sued provided under the Federal Tort Claims Act?

VI.

Was the Plaintiff's injury, if any, the result of an act of God?

VII.

Was the Plaintiff injured as a proximate result of negligence of the Defendant or Defendant's agents or employees and under circumstances under which a private landowner would be responsible for such injuries, if any?

Plaintiff's Exhibits

1. Series of X-rays.
2. Series of photographs.
3. Income tax returns.
4. Withholding slips and earnings records.
5. Hospital chart, notes, nurses notes and records.
6. Deposition of Robert Aufderheide.
7. Survey chart of accident scene.
8. Series of medical bills.
9. Series of administrative use permits granted to Oregon State Highway Dept.
10. Series of cooperative agreements between Defendant and State of Oregon.
11. Sample of wood from butt of snag.
- 12. Series of contracts between Lane Veneer and Fred Lemery.**

Defendant's Exhibits

1-17—Are cooperative agreements re construction and maintenance of the road in question between the Bureau of Public Roads, U. S. Forest Service, and the Oregon State Highway Commission, dated as follows:

Ex. 1—July 13, 1922.

Ex. 2—April 18, 1923.

Ex. 3—July 30, 1928.

Ex. 4—June 18, 1930.

Ex. 5—March 12, 1931.

Ex. 6—November 13, 1931.

Ex. 7—August 8, 1932.

Ex. 8—October 28, 1932.

Ex. 9—October 17, 1934.

Ex. 10—July 19, 1937.

Ex. 11—November 29, 1937.

Ex. 12—March 4, 1939.

Ex. 13—April 7, 1950.

Ex. 14—December 18, 1950.

Ex. 15—July 13, 1953.

Ex. 16—April 5, 1955.

Ex. 17N—November 4, 1955.

18—Series of photographs of scene of alleged accident.

19—Map of the area.

20—Map of the area.

21—Excerpt from Minutes of Meeting, December 19, 1950, of Oregon State Highway Commission, entered on Page 17456, Part 3 of Volume 35, of

Minute Book of the Oregon State Highway Commission.

22—Letter dated November 26, 1956, from Oregon State Highway Department, Division Engineer, to Acting Maintenance Engineer, Salem, Oregon.

23—Agreement dated June 10, 1957, between the State of Oregon and Lane County, Oregon.

24—Letter dated June 18, 1936, from Oregon State Highway Commission to Mr. W. H. Lynch, District Engineer, Bureau of Public Roads.

25—Letter dated October 8, 1953, from Oregon State Highway Commission to Mr. W. H. Lynch, District Engineer, Bureau of Public Roads.

26—Letter dated October 16, 1953, from Oregon State Highway Commission to Mr. W. H. Lynch, District Engineer, Bureau of Public Roads.

27-34—Series of Administrative Use Permits to cut snags:

Ex. 27—12/2/46 (issued), 1/30/48 (comp'd).

Ex. 28—8/30/46 (issued), 1/23/48 (comp'd).

Ex. 29—10/29/45 (issued), 1/2/46 (comp'd).

Ex. 30—9/13/44 (issued).

Ex. 31—10/27/47 (issued).

Ex. 32—6/20/49 (issued).

Ex. 33—11/3/48 (issued).

Ex. 34—11/20/56 (issued).

The foregoing is a pre-trial order agreed upon at the conference between counsel and the Court. It shall not be amended at trial except by consent or to prevent manifest injustice. It supersedes the pleadings, which now pass out of the case.

Dated at Portland, Oregon, this 14th day of May, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

Approved by:

/s/ E. B. SAHLSTROM,
Of Attorneys for Plaintiff.

/s/ C. E. LUCKEY,
United States Attorney,
of Attorneys for Defendant.

Lodged April 22, 1958.

[Endorsed]: Filed October 10, 1958.

[Title of District Court and Cause.]

OPINION

September 30, 1958

Solomon, Judge:

Plaintiff filed an action against the United States pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C.A Sec. 1346(b), for injuries he received when a tree in the Willamette National Forest broke, fell across the adjacent highway and struck the vehicle in which Plaintiff was riding.

The Willamette National Forest contains more than 1,600,000 acres of forest lands in their natural state and is located in Western Oregon. There are approximately 19,200,000 acres of land in Western

Oregon, of which 82 per cent, or approximately 15,600,000 acres, consist of commercial and non-commercial forest lands. Practically all of these lands are commercial forests, and ownership thereof is about equally divided between the United States and private persons.

Just before its fall, the tree was on a hill about 84 feet upward and 112 feet from the center line of the road. It was dead and apparently had been dead for some time. Although Forest Service employees obviously knew that trees were on this tract and that some of them were dead, they did not know of the existence or condition of this particular one. A dead tree is not necessarily a dangerous tree.

The tree fell across the Old Willamette Highway at a point approximately 40 miles from Eugene, Oregon, the county seat of Lane County. In recent years, this highway has had little traffic because the new Willamette Highway 58 provides a more direct route for traffic between Eugene and Oakridge.

The State of Oregon maintains hundreds of miles of public highways which run through rural forest lands. Under various agreements between the State of Oregon and the Federal Government, the Oregon State Highway Department has assumed responsibility for the maintenance of the Old Willamette Highway. Its employees have made periodic inspections of the timberland adjoining the highway, and upon request have received permission from the United States Forest Service to cut particular trees deemed to be potential sources of danger.

Under the Federal Tort Claims Act, the United States is liable for damages:

“for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C.A. Sec. 1346(b).

Plaintiff contends that the United States as a property owner was negligent in failing to make periodic inspections of its forest lands in order to discover potential dangers to the traveling public. Whether such failure constitutes negligence must be decided in accordance with Oregon law. *Olson v. United States*, 175 F.2d 510 (1949).

There are no Oregon cases in point. Plaintiff has asked us to find that Oregon will adopt the rule laid down in the following cases in which recovery was permitted: *Brandywine Hundred Realty Co. v. Cotillo*, 3 Cir. 1931, 55 F.2d 231, *Brown v. Harrison*, (CA eng. 1947) 177 L.T.R.(N.S.) 281, and *Hay v. Norwalk Lodge No. 730 B.P.O.E.*, (Ohio 1951) 109 NE.2d 481. In the *Brandywine* case, Plaintiff was driving on one of the principal through roads of Delaware, about two miles north of Wilmington, when a chestnut tree located on Defendant's land, about 10 feet from the road,

broke and fell on Plaintiff's automobile. In *Brown v. Harrison*, Plaintiff was injured when traveling on the highway from Knowle to Warwick, England, when a chestnut tree in an obvious state of decay, 18 feet from the highway, broke. In *Hay v. Norwalk Lodge No. 730 B.P.O.E.*, Plaintiff's decedent was killed when limbs from a tree located on Defendant's property fell on the highway. The complaint alleged that large limbs from the tree extended over and above the traveled portion of New State Road; that several years prior to the accident the tree had been struck by lightning and had been extensively weakened and damaged. It further alleged that although Defendants had knowledge of these facts, they had failed either to remove the tree or to brace and secure it, and had failed to give notice of such defect to the traveling public. The Supreme Court of Ohio held that the complaint stated a cause of action.

In all of these cases the tree which fell was either in or within a few feet of a highway and was located in well-populated areas. Not one was from forest lands in their natural state or from an area in which there were many such lands.

The *Hay* case is distinguishable on the additional ground that the complaint alleged actual notice of the defective condition. The Court, after an extensive examination of the authorities, “* * * concluded that, although there is no duty imposed upon the owner of property abutting a rural highway to inspect growing trees adjacent thereto to ascertain defects which may result in injury to a traveler

on the highway, an owner having knowledge of a patently defective condition of a tree which may result in injury to a traveler on a highway must exercise reasonable care to prevent harm from the falling of such tree or its branches on a person lawfully using the highway." 109 N.E.2d 481, 486. Because of its reliance on actual notice, the Ohio court does not adhere to the rule laid down in either *Brandywine Hundred Realty Co. v. Cotillo* or *Brown v. Harrison*, but is actually aligned with the courts which follow the opposite rule.

The leading case which holds there is no duty to inspect is *Chambers v. Whelen*, 4 Cir. 1930, 44 F.2d 340. In that case the tree which fell was situated 20 feet from a public highway in a large tract two miles from Welch, West Virginia. There were no dwelling houses in the vicinity. The question presented was "whether the owner of land in a rural section is charged with the duty of keeping himself informed as to the condition of trees growing on his property alongside the public road, so that failure to perform this duty constitutes actionable negligence."

The late Judge John J. Parker, speaking for the Court, held that there was no such duty for the reason that the danger to travelers is a remote one and the imposition of a duty to inspect would be an intolerable burden on the land owner.

He also came to the conclusion that "(t)he inspection and removal of trees standing near a highway is, in substance, not a matter affecting the use of

the abutting property, but a matter affecting the safety of the road * * * and the duty of inspection would seem to rest upon those whose duty it is to make the highway safe." See also *Zacharias v. Nesbitt*, 150 Minn. 369, 185 N.W. 295, and *Patterson v. Canadian Robert Dollar Company Ltd.*, (1928) 41 B.C. 123.

The economy of Oregon is largely dependent upon the lumber industry. Millions of acres of land in Oregon are in natural forests. It is unthinkable that the Oregon courts would impose upon the owners of forest lands, adjacent to little-used roads in sparsely-settled areas, the duty to inspect and remove trees which are likely to fall because of natural decay.

In this case the location of the tree which fell, the absence of knowledge of its existence or condition, and the assumption of responsibility by the Oregon State Highway Department for the condition of the roads all require a judgment in favor of the Government.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having on May 14, 1958, come on before the Court for trial, and a pretrial order having been entered, and it having been agreed by

the parties and the Court having ordered that the trial proceed first on the segregated question of the Defendant's liability, and the Court having heard testimony, considered the exhibits, and considered the arguments and briefs filed herein, and being advised, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That the Plaintiff is a resident of Oregon.
2. That on November 13, 1956, the Plaintiff was a passenger in a 1954 GMC Suburban Panel Truck, commonly known as a "crummy," owned and operated by one Dean Glen Thompson, on a public highway extending between the communities of Westfir and Oakridge in Lane County, Oregon.
3. That on November 13, 1956, at a point on said highway near the Hell's Gate Bridge between Westfir and Oakridge in Lane County, Oregon, a snag fell from the forest lands immediately adjacent and adjoining said highway and owned by Defendant, upon and striking the "crummy" in which Plaintiff was a passenger.
4. That just before its fall, the tree was on a hill about 84 feet upward and 112 feet from the center line of the road. It was dead and had apparently been dead for some time.
5. The Forest Service employees knew that trees were on the tract from which the tree fell and it

could be reasonably expected that some of the trees in the tract would be dead.

6. A dead tree is not necessarily a dangerous tree.

7. The employees of the Forest Service did not know of the existence or condition of the particular tree which fell across the vehicle in which the Plaintiff was riding.

8. The Court takes judicial notice and the evidence corroborates that the Willamette National Forest contains more than 1,600,000 acres of forest lands in their natural state and is located in Western Oregon; that there are approximately 19,200,000 acres of land in Western Oregon, of which 82 per cent, or approximately 15,600,000 acres consist of commercial and non-commercial forest lands; that practically all of these lands are commercial forests, and ownership thereof is about equally divided between the United States and private owners.

9. The tree fell across the Old Willamette Highway at a point approximately 40 miles from Eugene, Oregon, the county seat of Lane County, in an area rural in character.

10. A relocation of the Willamette Highway some months before the accident had diverted much of the traffic formerly using the particular portion of highway where the tree fell for travel between Eugene and Oakridge, Oregon, because the new route was an improved and more direct route.

11. The State of Oregon maintains hundreds of miles of public highways which run through rural forest lands, and on November 13, 1956, at the time of the accident complained of, had assumed full responsibility for maintenance of the Old Willamette Highway at the point where the accident occurred, by practice and under various agreements between the State of Oregon and the United States.

12. Employees of the State of Oregon, pursuant to such responsibility, have made periodic inspections not only of the traveled portion of the highway and highway right-of-way, but of the adjoining timber land, and in recognition of such responsibility, employees of the State of Oregon have made request for and received permission from the United States Forest Service to cut particular trees deemed to be potential sources of danger.

13. The State of Oregon employees had made no such request concerning this particular tree which fell.

14. The employees of the Defendant did not inspect the snag prior to the accident herein.

15. The failure of the Defendant's employees to inspect the tree which fell was not negligence, and neither the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing damage to the Plaintiff.

Conclusions of Law

1. Whether the United States, as a property owner, was negligent in failing to make periodic inspections of its forest lands abutting rural public roads in order to discover potential dangers to the traveling public must be determined in accordance with Oregon law.

2. Under the facts of this case, the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed.

3. The injury to the Plaintiff was not caused by the negligence of the United States or its employees.

4. The United States is not liable to Plaintiff under the Federal Tort Claims Act.

Let judgment be entered accordingly.

Dated this 24th day of October, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

Presented By:

/s/ C. E. LUCKEY,
United States Attorney,
of Attorneys for Defendant.

[Endorsed]: Filed October 24, 1958.

In the United States District Court
for the District of Oregon

Civil 9266

DEWEY J. O'BRIEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having been tried before Court, and the Court being fully advised and having made and filed its Opinion and Findings of Fact and Conclusions of Law,

It Is Hereby Ordered and Adjudged That the Defendant have judgment herein and that the Plaintiff take nothing by this action.

Made and Entered this 24th day of October, 1958.

/s/ GUS J. SOLOMON,

United States District Judge.

Presented By:

/s/ C. E. LUCKEY,

United States Attorney,
of Attorneys for Defendant.

[Endorsed]: Filed October 24, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dewey J. O'Brien, Plaintiff above named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain Judgment made and entered in this action on the Twenty-fourth Day of October, 1958.

E. B. SAHLSTROM,

PHILIP A. LEVIN,

By /s/ PHILIP A. LEVIN,

Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed December 17, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Comes now Plaintiff, Dewey J. O'Brien, by and through his attorneys, E. B. Sahlstrom and Philip A. Levin, and files this his statement of points and designation of record on appeal;

Plaintiff will rely upon the following points:

1. The Court erred in finding that, "The failure of the Defendant's employees to inspect the tree which fell was not negligence, and neither the United States nor any of its agents or employees

was guilty of any negligent or wrongful act or omission proximately causing damage to the Plaintiff.”

2. The Court erred in concluding that, “Under the facts of this case, the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed.”

3. The Court erred in concluding that, “The injury to plaintiff was not caused by the negligence of the United States or its employees.”

4. The Court erred in concluding that, “The United States is not liable to Plaintiff under the Federal Tort Claims Act.”

5. The Court erred in failing to hold that the Defendant United States had a duty to make reasonable inspections of its forest lands abutting public roads in order to discover and remove potential dangers to the traveling public.

6. The Court erred in failing to hold that the Defendant had actual or constructive notice of facts sufficient to put it upon inquiry as to the condition of the tree which fell and injured Plaintiff.

7. The Court erred in failing to find that the Defendant was guilty of negligence in the above respects which was a proximate cause of the injury to the Plaintiff.

8. The Court erred in failing to find that the

Defendant was liable to Plaintiff under the Federal Tort Claims Act.

Dated this 9th day of January, 1959.

E. B. SAHLSTROM,

PHILIP A. LEVIN,

By /s/ PHILIP A. LEVIN,

Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed January 9, 1959.

[Title of District Court and Cause.]

Before: Honorable Gus J. Solomon,
U. S. District Judge.

EXCERPT FROM PROCEEDINGS

Appearances:

E. B. SAHLSTROM,

Attorney for Plaintiff.

C. E. LUCKEY,

United States Attorney, District of Oregon,
Attorney for Defendant.

Morning Session

(At 9:15 A.M., Wednesday, May 14, 1958, the following proceedings were commenced, opening statements omitted:)

JOHN LAURILA

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Court, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. State your name, please.

A. John Laurila.

Q. Where do you live, Mr. Laurila?

A. In Eugene, Oregon.

Q. What address?

A. 289 Van Avenue.

Q. What is your occupation?

A. I am a registered professional engineer.

Q. By whom are you employed, or with?

A. I am a partner in Western Engineering Consultants.

Q. They have offices here in Eugene?

A. That's right.

The Court: Is there any question about his qualifications? [2*]

Mr. Luckey: No.

The Court: Please continue.

Mr. Sahlstrom: At my request did you make a survey and a map of the area from which the tree fell as referred to in this case?

A. Yes, I did.

The Court: Is there any objection to the map?

Mr. Luckey: I don't think so, your Honor. I haven't seen the map.

(Testimony of John Laurila.)

The Court: It will be admitted.

(At this point a survey chart of accident scene was marked for Identification and received in evidence as Plaintiff's Exhibit No 7.)

Q. (By Mr. Sahlstrom): Will you take a pointer, please, and describe the area to the Court and describe the location of the tree? Tell us what the scale is.

A. Is there a pointer around?

Mr. Sahlstrom: The Bailiff will hand it to you.

The Witness: This is the bridge referred to as Hells Gate Bridge by the Highway Department. It crosses the middle fork of the Willamette River near Westfir.

This road here (indicating) runs north to Westfir and the highway continues to Oakridge in this direction here (indicating). [3]

The tree that is involved is on a slope right here on the Government property at the edge of the State Highway right-of-way line.

The Court: Now, tell me, this is what they call the old highway?

The Witness: That's the old highway. There is a new highway that takes a different route to Oakridge now subsequently.

The Court: How far is the old highway from the new highway?

Q. (By Mr. Sahlstrom): Across the river?

A. Just across the river, I'd say, four or five hundred feet.

(Testimony of John Laurila.)

The Court: How long ago was the new highway built?

The Witness: I'd say within the last three years.

Q. (By Mr. Sahlstrom): Mr. Laurila, is this the road there between Westfir and the communities of Willamette City and Oakridge?

A. This one goes to Westfir (indicating).

Q. Yes. Is that the road you would take to go from Westfir to Oakridge?

A. Yes. That's right.

Q. Show him where you would go to Oakridge.

A. Oakridge in this direction (indicating).

Q. Is that map drawn to scale?

A. Yes.

Q. What is the scale?

A. One inch to 20 feet.

Q. Point to the location of the stub of the tree where the tree fell from?

A. The stub is down here. And where it originated is up here (indicating),—

Q. All right.

A. —the red dot up here.

Q. How many feet from that red dot down to the highway proper?

A. About 112 as it was stated previously is correct.

The Court: You mean it fell all across the highway and extended beyond the highway?

Mr. Sahlstrom: Yes.

The Witness: It must have, because this is

(Testimony of John Laurila.)

where we located the rotted part that had fell from up here (indicating).

Q. (By Mr. Sahlstrom): Will you mark with an "X" the location of where the top of the tree now is on the lower bank of the river?

(At this point the witness did as requested.)

Q. Now, what is the width of the highway at that point, approximately?

A. The right-of-way width?

Q. No, the highway, the paved portion? [5]

A. 22 feet wide, asphalt surface.

Q. On the upper side is there a bank?

A. Yes, there is, and a ditch along the bank.

Q. What is that?

A. And a ditch—a drainage ditch along the bank.

Q. Does the map show where the bank starts and where it ends?

A. Yes. It starts at the ditch line.

Q. Where does it end?

A. Just continues up (indicating).

Q. Is the line drawn there where the bank ends?

A. No; only the right-of-way line is.

Q. Is that a steep bank? A. Yes, it is.

Q. Is the tree from which this—or the snag that fell, is that near the edge of that bank, the upper edge of the bank?

A. Well, the hillside continues quite a distance up.

Q. All right.

(Testimony of John Laurila.)

A. And this snag is on the edge of the hill.

Mr. Sahlstrom: I have no further questions.

Cross-Examination

By Mr. Luckey:

Q. When was the map made? [6]

A. The map was made just very recently; April 22nd. But the field information was taken one year ago, March 7th, '57.

Q. By you? A. By me, yes.

Q. Of course, when you speak of where the rest of the stump is you have no knowledge of where it actually fell?

A. No; just as I located it in the field.

Mr. Luckey: Thank you.

The Court: That is all.

Mr. Sahlstrom: No further questions.

(Witness excused.)

Mr. Sahlstrom: I will call Mr. Aufderheide. [7]

ROBERT AUFDERHEIDE

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. What is your address, Mr. Aufderheide?

A. 2240 Friendly Street, Eugene, Oregon.

Q. What is your occupation?

(Testimony of Robert Aufderheide.)

A. I am Forestry Supervisor, Willamette National Forest.

Q. Was that your employment on the 13th day of November, 1956? A. Yes.

Q. What are your general duties?

A. General administration of the Willamette National Forest.

Q. From where this tree fell, is that a part of the Willamette National Forest? A. Yes.

Q. Is it under your direct supervision and control? A. Yes.

Q. How many men do you have under your employment?

A. We have approximately 150 year-long people. And our employment varies seasonally; in the summertime a maximum of about 425.

Q. In the immediate area do you have any office located where this tree fell from? [8]

A. We have a ranger headquarters at Oakridge.

Q. How many miles is that from where the tree fell?

A. Oh, I think it would be approximately three miles.

Q. How many people do you have there?

A. Year-long people, we have around six or eight people.

Q. Yes. In connection with your work do you have occasion to go along this highway, travel along this highway—— A. Yes.

Q. ——Where the tree fell from? A. Yes.

(Testimony of Robert Aufderheide.)

Q. About how often would you do so prior to November 13th, '56?

A. Probably about 10, 12 times a year.

Q. As you would proceed along would you take occasion to look to either side to examine the timber as you went along?

A. I do look at timber, yes. This particular area would be visible to you going east. As you are coming off the bridge approach and rounding a curve the tree would stand on a high bank. I think going west you probably wouldn't see it.

The Court: Can you tell from the highway whether a tree is rotted or in good shape?

The Witness: No. You could to some extent if you saw the tree. But I have no recollection of ever having seen this particular tree during my [9] travels.

But you can tell something about the condition of a tree just at a casual glance all right.

Q. (By Mr. Sahlstrom): You could tell if the tree was dead from the highway, couldn't you?

A. Yes.

Q. You could tell it was a snag, couldn't you?

A. Yes.

Mr. Sahlstrom: All right. Hand him the defendant's photographs.

(At this point a manila folder containing a series of photographs was marked for Identification as Defendant's Exhibit 18.)

Q. (By Mr. Sahlstrom): Handing you Defend-

(Testimony of Robert Aufderheide.)

ant's Exhibit 18, would you examine those, please? Now, Mr. Aufderheide, did you have occasion to visit the place where the tree fell after the accident?

A. Yes. I was there yesterday.

Q. And you have been there prior to that time, have you not?

A. I have been by there on the highway and have stopped on the highway earlier this year.

Q. Now, handing you Defendant's Exhibit No. 18, are those photographs that fairly portray the scene where the accident happened?

A. Yes. [10]

Q. And can you point out to his Honor the stub of the tree from where the snag fell?

(At this point the witness did as requested.)

Q. Is that tree visible from the highway?

The Court: He has alreday testified to that; one way it is and one way it isn't.

The Witness: Yes, it is.

Q. (By Mr. Sahlstrom): Now, in the course of the employment would other men of your department have occasion to use the highway, too?

A. Yes.

Q. About how often do you think and how many?

A. Well, we have sales administration up the North Fork of the Willamette. And I imagine that that would be traveled by some of our people at least twice a week up that area, maybe oftener; I don't know.

(Testimony of Robert Aufderheide.)

Q. Is it a part of their job to, as they drive along, look for snags in connection with timber sales?

A. We have been interested in salvaging dead material that is merchantable. And people engaged in timber sale business certainly look for salvage possibilities.

Q. To answer the question specifically, isn't it a part of your job to determine whether or not there are snags in a given area, to see if it is economically feasible to have a timber sale of those snags? [11]

Mr. Luckey: I would suggest that is irrelevant, your Honor.

The Court: In a given area; is that your question?

Mr. Sahlstrom: Yes.

The Court: Was it part of your duties to determine the number of snags in this area or the amount of snags to determine whether it would be economically feasible to remove the snags?

The Witness: This—I might explain our situation in this way: We have cut snags along the highway strips. It is the policy of the Service in agreement with the Highway Department to maintain a natural appearance along these highways.

Now, where we do it under timber sale administration we have to have ground that is favorable enough so that we can remove the merchantable trees with tractors. This particular bank is very steep. It's got, I think, an 84 vertical—practically a vertical foot rise to the edge of the timber and

(Testimony of Robert Aufderheide.)

then there is a steep hillside continues from there. We could not—we cannot remove snags or dead trees in highway strips where they're very scattered.

I think our observation here would be——

Mr. Sahlstrom: Just a minute. I object to any conjecture unless you made an observation of this given area.

The Witness: Well, my observation of this area is that [12] there are no—there is no economical logging chance.

Q. (By Mr. Sahlstrom): Have you made an observation of it?

A. Yes; I have made an observation.

Q. When? A. Well, recently.

Q. Well, since the deposition was taken, is that what you mean?

A. Yes. Yes. I had no recollection whatever of this area before that time.

Q. Yes. Now, were aerial photographs taken of this area by your department?

A. We have aerial photos of the forest.

Q. Do you have them before you there? Handing you Defendant's 18, what does that series of aerial photographs portray?

A. This portrays the location of the general area, the snag and surrounding area.

Q. When were those taken by your department?

A. Mr.—one of our people here has that information. I don't have that.

Q. I am advised by your counsel that they were taken in 1955. Is that correct?

(Testimony of Robert Aufderheide.)

Mr. Luckey: I am advised in 1955, your Honor
The Court: All right.

Q. (By Mr. Sahlstrom): Now, what is the purpose of taking those aerial photographs? [13]

A. We use these aerial photos to help us—help give us information about timber and road locations.

The Court: Can you see the snag from an aerial photo? The Witness: No.

Q. (By Mr. Sahlstrom): When you take the aerial photo, don't you have some kind of lens that you use to look at the photo with? A. Yes.

Q. Then you can see the trees, can't you?

A. You can see individual trees. It would still be difficult to pick out an individual snag. There is some degree of obliqueness to these photos and it just depends on what particular—

Q. You would have some difficulty, but you can do it, can't you?

A. If conditions are ideal. You could not pick out every individual snag.

Q. Well, isn't that part of your purpose of taking aerial photographs, to see how many snags there are in some given area?

A. No. No, not solely, not as such.

Q. Well, isn't that one of your purposes?

A. You could tell very little from snags unless they were concentrated groups of killing in these areas. The main purpose of the aerial photos is to give you a picture of the topography [14] and general idea of the timber. You can distinguish old-growth from younger stands.

(Testimony of Robert Aufderheide.)

Q. That wasn't my question. Is it one of the purposes to determine if there are snags in a given area?

The Court: Can you answer that Yes or No and then you can explain.

The Witness: Well, the big purpose——

The Court: Well, we know what the big purpose is. But we will ask you, is one of the major purposes to determine snags?

The Witness: No.

The Court: Is one of the minor purposes to determine snags?

The Witness: Yes. It would be a minor purpose or minor—it would be a minor use you would get out of the photos.

The Court: A minor use but not a purpose for taking the film?

The Witness: That's right.

Q. (By Mr. Sahlstrom): Then how are they used in determining the quantity of snags? Tell the Court about that.

A. Well, our observations on the photos are checked through reconnaissance trips through the area. You—I doubt whether a person could tell how many snags were on an area from just an examination of the aerial photos unless they were extremely—unless through a burn there was a big concentration of them. [15]

The Court: Could you tell the existence of one snag near the highway——

(Testimony of Robert Aufderheide.)

The Witness: No.

The Court: —from the use of an aerial photo?

The Witness: I don't believe so.

The Court: Is even a minor purpose of these aerial photos to determine the presence of danger trees?

The Witness: No. You couldn't tell whether they were danger trees. There are a lot of green trees that have rot and have indications that would put them in that category.

The Court: All right.

Q. (By Mr. Sahlstrom): I want to ask you this question, Mr. Aufderheide. Do you recall the time your deposition was taken up in Mr. Luckey's office with respect to this case?

A. Well, I recall the deposition.

Q. At Page 23 of that deposition the following questions were asked to you and you gave the following answers:

"A. You determine that from your travels, both road travel and examination of aerial photos, and we fly the forest annually.

"Q. And you take aerial photographs?

"A. We don't take aerial photographs every year, but we have some that are available.

"Q. You have in your files an aerial photograph of this particular area, I would take it. [16]

"A. I would say so.

"Q. From that you can ascertain the number of snags? Is that correct? A. Yes.

(Testimony of Robert Aufderheide.)

“Q. Which would include the snag which we have reference to here?

“A. I would say so.”

Were those questions put to you and were those your answers at that time? A. Yes.

Mr. Sahlstrom: I will offer it in evidence as Plaintiff's Exhibit No. 6.

The Court: All right. It is admitted.

(At this point the deposition of Robert Aufderheide was marked for Identification and received in evidence as Plaintiff's Exhibit 6.)

Q. (By Mr. Sahlstrom): Now, since the deposition was taken, Mr. Aufderheide, have you had occasion to go up there and examine the snag itself or the remainder of that snag?

A. Yes; I did that yesterday.

Q. I want to show you a few samples taken from that snag for your examination here. They are Plaintiff's Exhibit No. 11.

(At this point the witness examined some material taken from a brown paper bag.) [17]

Q. Now, do those samples handed to you from Plaintiff's 11 appear to be the same type of wood that you saw on the outside of this snag as you examined it at the deposition taking?

A. Yes. It would be—it could have come from this snag.

Q. Yes. From your examination of the snag

(Testimony of Robert Aufderheide.)

itself, did you determine how long the snag had been dead?

A. I couldn't determine how long the snag had been dead.

Q. What would be your best judgment about it?

A. Except to say that it's been dead, apparently, a long while.

Q. What is your best judgment as to the number of years?

The Court: Did he previously give an estimate?

Mr. Sahlstrom: Yes, sir. He said more than five years.

The Witness: Yes. It would be more than five years; that's correct.

Q. More than ten years? A. Might be.

Q. Did the tree as you observed it appear to be rotted on the outside?

A. I examined the stub yesterday. And, of course, it appears that the bark was around the tree at the—prior to its falling. The bark was torn away from the downhill side and the tree was rotten around the base.

Q. The tree was rotted on the outside? [18]

A. Yes. With the bark around it it might have been quite a bit more difficult to have said just how the particular condition of the tree at the time was.

Q. Did you test the rot to see how deep the rot was through the tree?

A. I didn't test the rot, no.

Q. Did you make any observations as to how deep it was?

(Testimony of Robert Aufderheide.)

A. It's—some of the splinters have torn away from part of the tree. The rot appears to be quite deep.

The Court: Answer this for me: If you had had a man examine that tree prior to the time it fell could you have determined that the tree was rotten and that there was a likelihood of the tree falling?

The Witness: Yes. We could have determined that the tree was rotten. We have—I think the age of it would have indicated that it was old. And one could expect that it would begin to break off and fall.

The Court: If that determination had been made, then, you could have anticipated that the tree might fall over the highway?

The Witness: Well——

The Court: It could have fallen in various directions?

The Witness: Yes.

The Court: But it might have fallen over the highway?

The Witness: Yes, it might have fallen over the highway. [19] These snags frequently will begin to break off in short sections.

This one broke off about 10, 12 feet from the ground.

The Court: Is that an unusual situation?

The Witness: Well, I wouldn't call it unusual. But it's—it varies a little different from the normal pattern.

(Testimony of Robert Aufderheide.)

The Court: It is not the normal situation, but it is not an unusual situation?

The Witness: Yes. That's right.

The Court: Had you discovered the condition of the tree prior to the accident, did you have the facilities with which to remove the tree?

The Witness: I have never understood that it was my duty or responsibility to fall snags or danger trees along the highway.

The Court: Had you in the past done so?

The Witness: No, we have not done so.

The Court: Would you have reported it to the Highway Commission?

The Witness: If we were aware of a tree that looked particularly unsafe, why, we would do that. As a matter of fact, there was a companion tree to this. The Lane County Road Department now has this section of the road, having taken it over last year. And I reported the companion snag [20] to the Road Department and they felled it within the past two weeks.

The Court: So, since this accident you have examined trees along the highway?

The Witness: No. No. We have only examined this particular area—well, just the scene of the accident, and here was this other tree.

The Court: In other words, even though you say it wasn't part of your duties, having noticed that other snag when you were looking and preparing for this case, you then reported it to the Lane County authorities?

(Testimony of Robert Aufderheide.)

The Witness: Yes.

Q. (By Mr. Sahlstrom): Mr. Aufderheide, you recall in the deposition taking that I called your attention that the other dangerous snag was adjacent to the one that fell? Didn't I?

A. Yes. And we were aware of it, too, from our observation.

Q. Well, you knew of it before that time?

A. Yes.

Q. I asked you then what you intended to do about that tree, didn't I?

A. And I took it to—as an official of the Forest Service you were asking whether we were going to fall that tree.

Q. Yes. But I wanted to know why you hadn't removed it, didn't I?

(Discussion, not reported.) [21]

Q. (By Mr. Sahlstrom): Now, isn't it a fact, Mr. Aufderheide, that before the State Road Service goes upon your land to cut these trees they have to get your permission to do so first? A. Yes.

Q. In this case, even though the tree adjoining or right next to the snag that fell was called to the attention of the Lane County Department, they had to have your permission first before they could go in there and fall a tree, didn't they?

A. Yes.

Q. Yes. Since the accident have there been snags falling along the Willamette Highway?

(Testimony of Robert Aufderheide.)

A. Yes. The State Highway has felled snags along the highway below Westfir that I am familiar—I mean below Willamette City.

Q. Yes.

A. And I believe a little below Westfir.

Q. They had to have your permission first?

A. Yes, they obtained our permission.

Q. That was done only after this accident happened?

A. There has been similar snag-falling prior to the accident. This is a situation that has been going on for years.

But this particular recent felling was—well, it happened about—well, since the first of the year.

Q. Now, in this area you are acquainted with the general area where this accident happened, aren't you? [22]

A. Yes.

Q. And you know that there are about 25 homes directly across the Hells Gate Bridge, don't you?

A. Yes.

The Court: Where is the Hells Gate Bridge?

Mr. Sahlstrom: It is on the map. It is the lower part of the map, your Honor, probably a hundred feet or 200 feet from the accident area.

Mr. Luckey: The aerial photo will show it, too.

The Witness: This is the bridge across the river and the homes which Mr. Sahlstrom refers to—well, there are some motels. And here is the Westfir High School. And there are homes in here (indicating). There are also homes——

The Court: Where did the tree fall?

(Testimony of Robert Aufderheide.)

The Witness: It was located right here (indicating), and it fell across the highway this way (indicating).

The Court: And that is approximately how far from this group of homes and motel?

A. I believe Mr. Luckey has the exact distances on that.

The Court: All right.

Q. (By Mr. Sahlstrom): Now, the group of homes is just across the bridge, is it not?

A. Yes.

Q. Yes. A. Not far. [23]

Q. And you know that directly on the highway proper is where the tree fell is a large turn-out area there? There is a parking area and turn-out area?

A. There is a turn-out area.

Q. And you know that that is used for the members of the public to park their cars and to weigh the log trucks as they come down the river, don't you?

A. I hadn't known that log trucks were weighed there. There are cars parked there at times, yes.

The Court: Is there any question about the log trucks being weighed there?

Mr. Luckey: I don't think it is relevant, but it makes no difference.

The Court: Do you admit it?

Mr. Luckey: Yes.

The Court: All right.

Q. (By Mr. Sahlstrom): You knew that prior to the accident that this was a heavy-traveled high-

(Testimony of Robert Aufderheide.)

way between the communities of Westfir and Willamette City, Oakridge?

A. Yes, I would say it was heavily traveled.

Q. Now, in the past you have removed snags for timber sales, have you not? A. Yes.

Q. That's your regular practice, isn't it?

A. Yes. [24]

Q. I will ask you if the Edward Hines Lumber Company is not one of the adjoining property owners to the area where this timber fell?

A. Yes; the property line passes just to the west of the snag quite closely.

Q. I will ask you if you have taken it upon yourself to have a timber sale of the snags in this area either before or since the accident?

A. I am not aware of such a sale. A ranger, William Cummins, is here, and I think he could give that to you.

Q. You have no knowledge about that?

A. No, I have no knowledge.

Q. But you know that is the way to do it, don't you, to have the snags removed, is to have a timber sale of it?

A. If there are sufficient snags to make a chance and if——

The Court: Make a chance?

The Witness: An economic logging chance. A man can't go in for one snag. And a lot of snags have no merchantable wood, which is what the logger is after.

(At this point there was a discussion not transcribed.)

Mr. Sahlstrom: I will call Mr. O'Brien. [25]

DEWEY JACKSON O'BRIEN

produced as a witness in his own behalf, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Sahlstrom:

Q. Now, your name is Mr. O'Brien. You are the plaintiff in this case? A. That's right.

Q. Where do you live? A. Oakridge.

Q. At my request have you brought into the courtroom here a stub of the snag that fell from which you received your injuries?

A. That's right.

Q. That is the Plaintiff's Exhibit No. 11. When was this removed by you from the stump?

A. It was removed Sunday.

Q. This last Sunday? A. Yes.

Q. Has it been under your control since that time? A. Yes.

Q. You brought it directly here to the courtroom? A. Yes.

The Court: What portion of the tree did you cut it from?

The Witness: That's the piece where the—that came off [26] the snag itself. And it was the butt part of the tree where it broke off the snag.

(Testimony of Dewey Jackson O'Brien.)

(Testimony of Dewey Jackson O'Brien.)

The Court: Just below where it broke?

The Witness: Yes. That was part of the break there.

The Court: That was the stump still standing at the time you cut it off?

The Witness: No. This is the part that's across the road from the stump. The stump itself is still standing. This is a piece—the piece that adjoined onto the stump.

The Court: On what side of the road?

The Witness: It was on the opposite side of the road. That's where they shoved it across the road there after the accident.

The Court: Well, how could you tell that this was part of the same tree?

The Witness: Well, because I knew it was. As a matter of fact, they was people down there the next day was watching them shove it across the road and this tree wasn't there prior to the accident, I know.

The Court: All right.

Q. (By Mr. Sahlstrom): I am going to hand you a couple photographs, Mr. O'Brien.

The Court: Don't you have someone who can identify this tree?

Mr. Luckey: I don't have, your Honor. The only thing I [27] am concerned about, this accident was a couple of years ago. And, apparently, this is off of a piece of wood that's been lying across the road in weather for a couple of years. I don't think it has any particular value to us here.

Q. (By Mr. Sahlstrom): Now, I will hand you

(Testimony of Dewey Jackson O'Brien.)

the Defendant's Exhibit 18. Do you recognize what those pictures show there? A. Yes.

Q. What are they?

A. Well, the upper left-hand corner is a picture of the snag and part of this slope of the highway and the cliff. And the bottom one is the highway looking towards Oakridge. The one to the right is the stump of the snag.

The Court: Tell us briefly how the accident happened.

The Witness: Well, we was coming home from work and the last I remember we stopped at this stop sign and I was talking to my dad in the back seat and I had this leg up in the seat like this (witness demonstrates) and my arm on the backrest. And this leg was sticking ahead (witness demonstrates). There was no warning or no nothing. We didn't know nothing about it till I woke up sitting down alongside the river down by the side of the Willamette. And it was some time later.

The Court: You were not driving the car?

The Witness: No, I was not. The foreman or my boss——

The Court: It is admitted that the tree fell on the car?

Mr. Luckey: Yes, we acknowledge that, your [28] Honor.

The Court: It struck the car as the car was driving down the highway?

The Witness: That's right.

(Testimony of Dewey Jackson O'Brien.)

Mr. Luckey: That's right.

The Court: All right.

Mr. Sahlstrom: I have no further questions of the witness.

Mr. Luckey: May I ask a question or two?

The Court: Yes, surely.

Cross-Examination

By Mr. Luckey:

Q. Mr. O'Brien, how long had you lived up in that area? A. Well, I moved there in 1953.

Q. You had been along this road many times?

A. Yes; I used to work at Hines Lumber Company, Westfir.

Q. Did you ever notice this tree before?

A. Well, I have seen them along there. I don't know this particular tree, but I noticed snags from Oakridge through there.

Q. Anything about this tree that ever attracted your attention before as you drove along there?

A. Well, I can't say just exactly that would attract my attention. I know I seen—not this particular tree, but the one that they fell just here a couple of three weeks ago, [29] because the roots were sticking out over the edge of the cliff on that side off on the slope of the highway.

Q. In reference to this particular tree, was there anything that attracted your attention to it before?

A. No; because it was behind the other tree.

Q. Was it covered with bark just before the accident?

(Testimony of Dewey Jackson O'Brien.)

A. It may have been bark part of the way up. I don't remember.

Q. There was bark and debris around the road, wasn't there, at the scene of the accident after the tree fell? A. Yes.

The Court: After the tree fell?

Mr. Luckey: Yes, your Honor.

The Witness: Because I came through there with an ambulance and seen it.

Q. (By Mr. Luckey): As you travel along the road isn't it a fact it's pretty high up?

A. Yes, it is.

Q. For anybody to observe it you'd have to——

A. Yeah. Well, you could look up out of the window. I know I have looked there several times since.

Q. You couldn't very well drive along and keep an eye on the road and still observe that tree?

A. No. No, you couldn't very well from the driver's seat unless you were coming back the other way. [30]

Q. As you were coming back the other way wasn't it obscured by the bank?

A. Well, yes, I guess it would be. But you could see it, I mean, if you was looking.

Mr. Luckey: Thank you very much, Mr. O'Brien.

Redirect Examination

By Mr. Sahlstrom:

Q. Mr. O'Brien, at my request did you go up there and cut some samples off of the snag, put

(Testimony of Dewey Jackson O'Brien.)

them in a paper bag, and bring them down to my office? A. Was it at your request?

Mr. Sahlstrom: Yes.

Q. Did you do that? A. Yes, I did.

Mr. Sahlstrom: I will hand you Plaintiff's Exhibit 11.

The Witness: Yes. That is them. That's off of that piece right there (indicating).

Q. They were taken from Exhibit No. 11 here, I guess? A. Yes.

Q. All right.

A. They was—that's where I chopped them off. As a matter of fact, I think they will match up.

Mr. Sahlstrom: No further questions. [31]

Recross-Examination

By Mr. Luckey:

Q. These were taken at the same time, last Sunday?

A. No. No. I had this here—this was taken—well let's see. That was taken about a month ago.

Mr. Luckey: All right. Thank you very much.

(Witness excused.)

Mr. Sahlstrom: Call Mr. Presstinen as an adverse witness. [32]

FRED M. PRESSTINEN

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

(Testimony of Fred M. Presstinen.)

Direct Examination

By Mr. Sahlstrom:

Q. Where do you live, Mr. Presstinen?

A. 1509 West First, Eugene, Oregon.

Q. What is your occupation?

A. I am a Forester and I am on the Forest Supervisor's staff of fire control.

Q. Did you make an examination of the premises where the accident happened in this case?

A. Yes, I did.

Q. On what date?

A. Oh, I believe it was August 7th.

Q. August 7th? A. 1956.

Q. And, again, what date?

A. '57. Beg your pardon.

Q. At some later date, too?

A. Yes. I was there——

Q. In December?

A. ——in December and again—I was up there yesterday.

Q. All right. You made an examination of the tree from which this snag fell? [33]

A. Yes, I did.

Q. Have you examined Exhibit No. 11 here in court? A. Yes.

Q. Does that appear to be the same one?

A. Well, it resembles the wood of the dead tree there. I wouldn't know definitely if that's off of the same piece.

(Testimony of Fred M. Presstinen.)

Q. Does it appear to be in the same condition as when you saw it? A. Yes.

Q. Have you made an examination of it here in the courtroom?

A. Yes, I have, just hastily.

Q. Can you tell the Court how deep the rot is on that stub of the tree?

A. Well, on this one side there it's about 8 to 10 inches on that one side.

Q. Yes. Is the rot visible from the exterior?

A. Yes. There is some visible there.

Q. Yes. Now, how do you describe this material? Is it rot or punk or what is that?

A. Well, it's a brown rot. There are several of them. And it would take an analysis to determine which one they are. It's a cubicle brown rot.

Q. What causes that?

A. Well, the analysis would tell. Some of them attack the tree while it's still green and some attack the tree after it's [34] dead. I'm not positive which one this is.

Q. From your examination of the premises there and your examination of the snag after the accident happened and again here in the courtroom today, what is your best judgment as to the length of time that this tree has been dead?

A. Well, it would be difficult to say exactly, but I would say it's—it would be 15 or 20 years, something like that. That's purely an estimate.

Mr. Sahlstrom: No further questions.

(Testimony of Fred M. Presstinen.)

Cross-Examination

By Mr. Luckey:

Q. Mr. Presstinen, does a tree after it's down continue to rot if a portion of it were lying along the ground? A. Yes.

Q. Would that continue to rot faster than it would when it was a standing tree, or about the same, or what?

A. It would depend on the type of rot that was attacking it. Sometimes it would and sometimes it wouldn't.

Q. Do you have any idea about this particular rot?

A. No. I say, I don't know which—it's a brown rot and there are several brown rots.

Q. But, as a matter of fact, isn't the tree more exposed to the elements, the rain, the weather and so forth, by being along horizontally on the ground and in contact with the [35] ground?

A. You have a larger area exposed, yes.

Mr. Luckey: Thank you.

Redirect Examination

By Mr. Sahlstrom:

Q. In connection with your examination did you measure the length of this tree, Mr. Presstinen?

A. The portion that was laying over the bank, was that your question?

Q. Yes, sir.

(Testimony of Fred M. Presstinen.)

A. No, I did not. I assumed that was from a snag. But I am not positive that it came off it.

Q. Yes. What is the approximate diameter of the tree—of the snag, as you observed it, after the accident and again here in the courtroom?

A. Well, that section there (indicating)——

Q. Yes. A. Oh, that's about 2-1/2 feet.

Mr. Sahlstrom: No further questions.

Plaintiff rests, your Honor.

(Plaintiff rests.)

Mr. Luckey: The defendant will call Mr. [36] Stone.

J. HERBERT STONE

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Luckey:

Q. Mr. Stone, would you state your residence and position, please?

A. I live at 4465 Southwest 75th Avenue, Portland, Oregon, and I am the Regional Forester for Region 6 of the U. S. Forest Service.

Q. What territory does that encompass, involve?

A. That covers the national forest lands in Washington and Oregon, with a little bit—a very small amount in California.

Q. About how many acres do you have under your administration of national forest land?

A. Approximate 23,350,000 acres.

(Testimony of J. Herbert Stone.)

The Court: How many acres are there in the State of Oregon in total?

The Witness: You mean how many acres of national forest?

The Court: No. How many acres? How does that compare with the State of Oregon?

The Witness: The State of Oregon, as I recall, has approximately 66,000,000 acres.

The Court: So it is about one-third of the State of Oregon? [37]

The Witness: Yes. But this is spread over Washington, Oregon and a little bit in California.

Q. (By Mr. Luckey): How many miles of State, County and private roads are there that run through that national forest land in the area you administer? A. Approximately 3,000 miles.

Q. Now, with reference to the—to these private and State and County roads, what has been your practice with reference to trees that may be called to the attention of the Forest Service as danger trees to the driving public?

A. On these State, County and private roads that traverse or cross through national forest land we have not felt that it was our responsibility or duty to make an inspection of these to determine danger trees.

But our Forest Supervisors have been authorized to permit the State or the County or private agencies to fell any trees that may be danger trees—to give them permits to do that.

Q. Now, Mr. Stone, are those occasions when live

(Testimony of J. Herbert Stone.)

green trees fall across roads or fall down in the forests, as well as dead trees? A. Yes.

Q. Is there any way of ascertaining how long a dead snag may stand?

A. I know of no precise way of determining how long a dead [38] snag would stand. I have seen snags in areas or reported stands of timber over 200 years old and these snags were evidently there before that stand initiated—grew.

The Court: You mean the snags are over 200 years old?

The Witness: Well, that's just an estimate. I don't know that. But in this particular case the snag showed evidence of fire, and green timber which was over 200 years old did not show evidence of fire.

Mr. Luckey: Now, in the administration of these forests do you have any funds with which to cut down snags or danger trees for the safety of the traveling public as such?

Mr. Sahlstrom: I will object to the relevancy of the question, your Honor.

The Court: It will be overruled.

The Witness: We have no funds that are available for the felling of danger trees on State and County, private roads traversing national forest land unless they happen to be an old burn or cutting area on which we must fell snags as a fire-protection measure.

Q. (By Mr. Luckey): Are there any regulations that direct you to inspect or remove such trees for the traveling public?

(Testimony of J. Herbert Stone.)

A. Not from—along State and County and private roads.

Q. On this particular road and on roads in general in the State of Oregon through which the State Highways pass involving national forest lands abutting these highways, what has been [39] the practice with reference to the State removing such trees?

A. It has been our practice to issue permits to State or County authorities to remove any danger trees.

Q. Do they make requests for such permission to cut?

A. They make those requests through the Forest Supervisor or Ranger and Forest Supervisor who has the authority to issue those permits.

Q. Was any permission ever requested to cut this snag?

A. I do not know. The Supervisor of the Forest would—or Ranger would have that information.

Q. No request—

A. But no request was made to me, no.

Q. Did you have any personal knowledge of this particular tree? A. No, sir.

Q. Are you familiar with the area?

A. Yes, I am familiar with the general area. I have been through there.

Q. Was this tree standing in an area that was in its natural state, or was it an area that had been cut over or redeveloped, reseeded, or anything of that kind?

A. As I recollect—and I get up there very in-

(Testimony of J. Herbert Stone.)

frequently—but, as I recollect, there was a stand of timber up on the hillside there. But I don't have any real impression as to what the nature of that stand of timber was.

Q. Is there any forest trail right——

Mr. Sahlstrom: He testified he didn't know.

The Court: He testified he didn't know. Why don't you have some witness who is very well acquainted with this area?

Mr. Luckey: We will have Mr. Cummins explain that.

The Court: Any further questions?

Cross-Examination

By Mr. Sahlstrom:

Q. Mr. Stone, are dead snags more dangerous than live trees?

A. I don't know that I would be able to say one way or the other because I have seen some green trees, live trees, that have rot hidden in them and under wind pressure they break off even more—even sooner than the dead snags.

Q. Well, don't you regard these dead snags as hazards from a fire standpoint?

A. Yes, indeed, we certainly do. They throw fire. If a snag gets on fire it acts as a torch and the wind will blow sparks.

Q. You do have funds appropriated for removal of snags?

A. We have funds available for the reduction of fire hazard.

(Testimony of J. Herbert Stone.)

Q. Yes.

A. That's true. [41]

Q. This tree had some evidence on it of being in a burn at one time.

A. I don't know. I haven't seen that tree or the area.

Q. Was that your statement on direct, that there was some evidence of a burn in this area?

The Court: He never said that.

The Witness: No, not this particular tree.

Q. (By Mr. Sahlstrom): Not this particular tree? A. I was——

The Court: That was a hypothetical question about snags that had been standing for 200 years after they had been burned.

Mr. Sahlstrom: I have no further questions. Thank you.

Mr. Luckey: Thank you.

(Witness excused.)

Mr. Luckey: I would offer, your Honor, the exhibits that we have, 1 to 17, showing the co-operative agreements with the State of Oregon for the maintenance of this highway.

The Court: Have you shown them to Mr. Sahlstrom?

Mr. Sahlstrom: I have seen them, but I haven't read them, your Honor.

The Court: Any objection?

Mr. Sahlstrom: No objection.

The Court: They will be admitted. [42]

(At this point Defendant's Exhibits 1 to 17, were received in evidence.)

(At this point after some discussion Defendant's Exhibit 21, being Minutes of the State Highway Commission, was marked for Identification and received in evidence.)

(At this point after some discussion Defendant's Exhibits 24, 25 and 26, being letters from the Oregon State Highway Commission, were marked for Identification and received in evidence.)

(At this point after some discussion Defendant's Exhibits 27 to 34, being administrative use permits, were marked for Identification and received in evidence.) [43]

D. J. SAGE

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Luckey:

Q. Mr. Sage, where do you live?

A. I live here at Eugene.

Q. What is your occupation, sir?

A. I am District Maintenance Superintendent for the Oregon State Highway Department.

Q. How long have you been so employed?

A. Pardon?

Q. How long have you been so employed?

(Testimony of D. J. Sage.)

A. I have been employed for 22 years in that capacity.

Q. How long have you been headquartered at Eugene? A. Four years and two months.

Q. Do you have supervision of the maintenance of the Willamette Highway, or did you have on November 13, 1956, supervision of this particular portion of the highway that ran between Oakridge and Westfir? A. Yes, sir.

Q. I understand since that time the County has taken that portion of the road over; is that right?

A. That's correct.

Q. Now, at the time you had supervision of that portion of [44] the highway, was your attention ever directed to a snag that later fell across the road and injured Mr. O'Brien?

The Witness: Would you repeat the question, please?

(At this point Mr. Luckey's last question to the witness was read by the Court Reporter.)

The Court: That is, prior to the accident.

The Witness: No.

Q. (By Mr. Luckey): Had you ever seen the snag? A. No.

The Court: Not that you remember?

The Witness: That is correct; not that I remember. I wasn't familiar with the snag until after it fell.

Q. (By Mr. Luckey): Now, do you have people who patrol the highway for maintenance purposes

(Testimony of D. J. Sage.)

in that area? A. Yes, sir.

Q. And do those people also call to the attention of the Forest Service the trees that they consider dangerous to the public traveling the highway? A. On various occasions, yes.

Q. There has been permission to cut such trees, has there not, from the Forest Service?

A. Yes.

The Court: Do they have a blanket policy permitting the removal of these danger trees, or do you have to get the [45] permission of the Forest Service each time you decide to remove the danger tree?

The Witness: Generally speaking, we go over the work with the Forest Ranger and determine the trees that we would like to cut and then secure the permission, if possible, to cut those trees.

The Court: Have you ever been turned down for permission to cut a danger tree?

The Witness: Well, let me answer it this way: In our opinion a tree might be dangerous, but it might not be in the opinion of the Forest Service. And our request—we like to cut the trees, but we don't always receive permission.

The Court: In other words, it's not a permission granted in advance, but you must secure the permission of the Forest Service in order to cut a particular tree?

The Witness: Yes, sir.

Q. (By Mr. Luckey): Mr. Sage, do you recall talking to Mr. McCulloch, one of the F.B.I. agents, about this particular snag? A. Yes.

(Testimony of D. J. Sage.)

Q. Was there any discussion with reference to the height of the snag at that time or whether or not it might reach the road?

A. No, I do not recall.

Q. You don't recall that. Have you driven that road fairly [46] frequently in connection with your duties before this accident?

A. Would you ask me that again, please?

Q. Have you driven that road fairly frequently before this accident in connection with your duties?

A. Generally about once a week.

Q. Do you know what snag is involved now after the accident? A. Yes.

Q. Was there anything that ever attracted your attention to that snag before the accident?

A. No.

The Court: That's all.

Mr. Sahlstrom: No questions.

The Court: Next witness.

(Witness excused.) [47]

WILLIAM CUMMINS

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Luckey:

Q. Where do you live, Mr. Cummins?

A. At 855 South 2nd Street in Prineville.

(Testimony of William Cummins.)

Q. Where did you live on November 13th, 1956?

A. Oakridge.

Q. How long have you lived in Oakridge prior to that time?

A. Fourteen years.

Q. When did you move to Prineville?

A. March 21st.

Q. This year?

A. Yes.

Q. What were your duties at Oakridge?

A. District Ranger of the Oakridge District.
That was the administration of this Ranger District.

Q. On or after November 13th, 1956, was your attention called to a tree that fell across the road in the vicinity of Hells Gate Bridge?

A. After——

The Court: After it fell.

The Witness: Yes.

Q. (By Mr. Luckey): Was that from the area that you [48] administered?

A. Yes, it was.

Q. Now, are there any forest trails right adjacent to that tree?

A. There are no forest trails near there.

Q. Are there any forest camps immediately adjacent to it?

A. The nearest forest camp is Fair Run Camp about a mile and a half.

Q. How far is this tree from Oakridge or Wilamette City?

A. A little over two miles. About two miles.

Q. How far is it across the bridge to the motel?

A. Between 1,300 to 1,500 feet.

Q. Is the motel on the other side of the river

(Testimony of William Cummins.)

from this—— A. Yes, it is.

Q. ——particular area? The weighing of logs has been mentioned here. Are there any stationary scales in the vicinity of the tree?

A. No. The nearest scale is at Pleasant Hill.

Q. If there were weighing of logs, then, it would be by temporary portable scales?

A. That is correct.

Q. Now, how far is it about to Westfir from this area?

A. Well, the nearest house is a little over half a mile and the center of Westfir is, probably, a little over a mile, two miles. [49]

Q. Had you traveled this area frequently in connection with your duties?

A. Yes. It's on one of the areas that I travel.

Q. Had anything attracted your attention to this particular snag or tree?

A. Not before it fell; no, sir.

Q. Had anyone ever made any request of you to cut it? A. No.

Q. Had anyone ever called it to your attention?

A. No.

Q. Now, in connection with the management of that area, in the event that you had known that there were one or two snags in the location of this snag, would a sale have been feasible?

A. Not on that type of ground. It's very steep and there is no place to work in there.

Q. Did you have any funds at your disposal for

(Testimony of William Cummins.)

cutting such trees for the safety of the traveling public? A. No.

Q. What was the practice of the State Highway people who maintain the highway up there with reference to these trees in your area?

A. Since I have been in Oakridge they have requested permission to fall danger trees along the highway.

Q. Has that permission been granted? [50]

A. I have not refused permission to fall danger trees.

Q. Now, with reference to green trees, have green trees fallen across roads in the area?

A. Yes; more green trees than dead trees.

The Court: Isn't that due to the fact that there are more green trees than dead trees?

The Witness: I think that's correct.

Q. (By Mr. Luckey): Do you know whether or not this tree had bark on it before it fell?

A. I looked at the stump—if this answers the question, I looked at the stump afterwards and there was bark around the stump and there was also bark down on the road. So I would assume that there was bark around at least part of it.

Q. Did you see the remains of the tree shortly after the accident?

A. Yes. I didn't examine it carefully.

Q. Do you have a reasonable knowledge or estimate of the length of it?

A. I could not say the length of the tree now. I don't recall.

(Testimony of William Cummins.)

The Court: It was a pretty big tree, wasn't it?

The Witness: It was a large tree; yes, sir.

Q. (By Mr. Luckey): Was it among other growing trees?

A. I think there were younger trees. These were some of the older trees around there. I don't picture the forest [51] right at that spot now. But there are green trees around there, but I think generally a little younger age tree.

Q. Were these trees growing in their natural state? A. Yes, they were.

Q. Was there any cultivation around them or anything of that kind?

A. No. This is just woodland country.

Q. Are there rocks and things of that kind in the area, too?

A. Well, I didn't particularly notice. There are—it's very steep ground and there are—I didn't notice any loose rocks, if you mean loose rocks.

Q. Mr. Cummins, I wonder if you might have Exhibit 11 which is the aerial photograph? Do you utilize those aerial photographs in connection with your timber-management program?

A. Yes, sir.

Q. What is the purpose or use of those aerial photographs for timber management?

A. Well, we use them for locating areas to—of old-growth timber in which to make sales where you can distinguish the older trees from areas of reproduction.

We use them in locating roads, also to see what

(Testimony of William Cummins.)

the difficulties would be with the areas of rock slides and steep draws. I think those are the major uses we make of them.

Q. Now, Mr. Cummins, as you drove along the highway you have told us that this tree had never attracted your attention [52] before. Was the tree easily visible to someone driving along the road?

A. It wasn't to me. There is an intersection at that spot. That's one thing to attract your attention on the road going on the bridge—or from Westfir. And the other point is that it's a steep bank and you just don't normally look out—up at the tree at the location where it was.

Q. Then, in order to locate it, as a practical matter you would be required to walk on the ground and observe these——

Mr. Sahlstrom: I object, your Honor. That's leading and it calls for a conclusion.

The Court: I will sustain the objection.

Q. (By Mr. Luckey): What did you have to do to find this tree?

A. Well, if you stop and get out and look, you can see it. Or it's possible coming over from the bridge if you were particularly looking at the spot you can look at it if your attention is directed to it.

The Court: When was this aerial photograph taken?

The Witness: I could not say.

The Court: Was it before the accident?

The Witness: I wouldn't know when it was taken. I presume it was before the accident.

(Testimony of William Cummins.)

The Court: Did you examine this photograph to determine the presence or absence of snags in the area? [53]

The Witness: No, sir.

The Court: Or dead trees?

The Witness: No, sir.

The Court: Could you have by the use of a magnifying glass discovered the presence of a single dead tree?

The Witness: If I was trying to locate a particular point on the map and I knew it was there, it might be possible. I don't know. We do locate points sometimes.

But where there is a number of trees it's extremely difficult to tell what tree you are looking at. A snag, of course, would have no crown, no top to see. And it's quite difficult to locate it; particularly a green tree.

Q. (By Mr. Luckey): How many people did you have to manage this timber sales in your area?

A. Of the—in Oakridge? Of the permanent people, probably eight.

Q. About eight people?

A. About eight people.

Q. How big an area did you have?

A. I beg your pardon. That's not to manage timber solely. Of the folks that manage the timber we have—well, more like four.

The Court: I don't know what you mean by managing timber.

(Testimony of William Cummins.)

Q. (By Mr. Luckey): Would you explain what you mean by that?

A. We have men that are in charge of fire control maintaining [54] trails and telephone lines.

The Court: That is four people. Did you say you had four people in connection with that work?

The Witness: In connection with timber sales. But comparing timber and administrating sales——

The Court: Four. The other four worked in management?

The Witness: Yes. They are in——

The Court: But in summer you have more?

The Witness: Yes. We have lookouts and guards.

The Court: How big an area?

The Witness: Two hundred thirty-one thousand six hundred and some acres.

The Court: How does that compare with the size of Lane County?

The Witness: I could not say the size of Lane County.

The Court: Is that a pretty big area?

The Witness: The district?

The Court: Yes.

The Witness: It's a—I think it's one of the largest districts.

Mr. Luckey: I think that's all.

(Testimony of William Cummins.)

Cross-Examination

By Mr. Sahlstrom:

Q. Mr. Cummins, as you are westbound traveling along this [55] highway from Oakridge to Westfir, Oregon, or to Eugene, if you look to your right as you are westbound that tree—the snag is clearly visible, is it not?

A. No, I wouldn't—not to me it wasn't.

Q. What photograph do you have before you?

A. Are these marked in any way?

The Court: Here is one of the photographs.

The Witness: I have this photograph.

The Court: Here is a group of other photographs. Were you talking about looking south on the highway?

Mr. Sahlstrom: As you drive west you would look to the right. That would be up the hill.

The Court: Well, maybe this is the one you are referring to, Defendant's 18.

The Witness: The hillside is on the left. I think he refers to coming the other way and looking to the right.

Mr. Sahlstrom: Hand Plaintiff's No. 2 to the witness.

Q. That's Plaintiff's Exhibit No. 2. Now, that indicates a view to the right as you are westbound directly opposite the sign and up the hill. Now, from that point is the snag clearly visible?

A. Yes, it is. But you are not on the—you're not

(Testimony of William Cummins.)

on the road; you're off to the side of the road from this view.

Q. All right. Now, you take various aerial photographs. The one you have there in your possession is one that's been [56] a part of your records and under your direction and under your control, is it not; part of your records?

A. We have aerial photos of this district and of this particular spot.

Q. They are part of your records there at Oakridge, are they not? A. That is correct.

Q. And they are used in connection with your work? A. Yes.

Q. Now, how do you look at that aerial photograph? How do you determine the number of trees in a given area? What guides do you use?

A. To determine the number of trees?

Q. Well, how do you look at that photograph? What do you use to look at it with?

A. Well, I personally use it just looking at two pictures together——

Q. Don't you have some kind of equipment to use? A. Yes, we do.

Q. Well, describe it. What is it?

A. There is a stereoscope that may be used.

Q. What is that?

A. It is a glass which gives a three-dimensional effect to the picture if you put two pictures together and look at it. It gives a three-dimensional effect of seeing the hills [57] and the trees.

Q. Does that give you a close-up of the trees?

(Testimony of William Cummins.)

A. It may have some—I couldn't say as to that. I think the effect is to give it the three-dimensional effect. That's what they are after with that.

Q. What else do you use? What other kind of equipment do you use to view those photographs with?

A. I don't believe I understand.

The Court: Do you use a magnifying glass?

The Witness: No, I don't.

Q. (By Mr. Sahlstrom): Don't you have some kind of equipment to look at those aerial photos after you take them?

A. We use this—the—the only machine that I know of or—I think the thing that you are asking about is this stereoscope. That's all I know of.

Q. Right. Stereoscope. Now, if you look at that, don't you get a close-up view of the trees?

A. It may have some—I couldn't say.

Q. Haven't you ever used it?

A. I have.

Q. Don't you know if it gives a close-up or not?

A. I rarely use it.

Q. When you have used it, doesn't it give a close-up view?

A. I couldn't say that it magnifies any. I don't know.

Q. Well, what do you use it for, then? [58]

A. To get a three-dimensional effect to the——

Q. What is the advantage of that?

A. You can tell where the draws are, where the hills for road locations and for boundaries of timber sales units are.

(Testimony of William Cummins.)

Q. Are these aerial photographs used for cruises of a given area?

A. For a cruise. To determine volume, you mean?

Q. Yes.

A. I don't use it for that purpose, no.

Q. Are they used for that purpose?

A. I could not say. I beg your pardon. It's possible to if there are—I can't think of now any particular way that you would see it. I was thinking that you might in an area determine the size of an area and then through information that we had previously obtained get a volume.

Q. Well, don't you know that that is done here in Lane County, that practice is followed here?

A. Which practice is that?

Q. Of taking aerial photographs to assist in the cruise of a given quantity of timber of a given area? Don't you know that to be a fact?

A. I—I don't use them.

The Court: Do you know if other people use them to determine volume in a given area?

A. No, I don't know that. [59]

The Court: All right. He doesn't know.

Q. (By Mr. Sahlstrom): Have you yourself ever used those aerial photographs to determine the quantity of dead trees in a given area either for fire purposes or for timber sale purposes or other purposes? A. Not for quantity. For area, yes.

Q. Well, not for quantity. I don't limit the question to that. Have you used the aerial photo-

(Testimony of William Cummins.)

graphs to determine the quantity or number of dead trees in a given area?

A. Not to my recollection.

Q. Well, do people in your department do that?

A. Not to my recollection.

Q. How do you determine the quantity of snags in a given area, Mr. Cummins?

A. We go on the ground. We would use an aerial photo to first locate some of the boundaries of it and then we would go on the ground and actually count the trees.

Q. What is the purpose of that?

A. To determine the volume on the ground on the area.

Q. It is feasible economically to have a re-log or cutting of timber, dead trees, is it not; a timber sale of dead trees?

A. That's the purpose, to go on the ground to see that the ground is suitable and that there is adequate number of trees, yes.

Q. All right. When was this done in this particular area? [60] When was it done prior to November 13th, '56? When did you do that?

A. I never did it in this particular area where this snag——

Q. When did your department do it?

A. We have never done that.

Q. Why not?

A. We have not had occasion. It isn't a suitable place for a sale on the highway.

Q. Is that your only reason?

(Testimony of William Cummins.)

The Court: Have you got another reason to suggest?

Mr. Sahlstrom: Yes. They just hadn't gotten around to it, probably. Hadn't done it.

The Court: Is that right?

The Witness: We—we have a plan of making timber sales and it's projected over a period of time. We don't have the entire district laid out in sales or the volume obtained for all of the entire district, so we just obtain that information for the areas that we are actually selling or contemplate selling. This is not in one of those areas.

Q. (By Mr. Sahlstrom): But this tree is almost rotted all the way through. Now, I take it that it's been there a sufficient length of time for you to have made an examination of it for a count of it in connection with your timber sales.

The Court: I think he has already answered that, that this is not an area that they are contemplating selling anything [61] from in the immediate future.

Q. (By Mr. Sahlstrom): Now, did you notice in your examination of the premises where the accident happened that this snag was in an area where the bank had been cut away—close to the bank cutaway of the highway itself?

A. This is just above the upper limits of the cutting, yes, of the ground disturbance for the road.

Q. Did you notice that some of the dirt was removed away from the area of the roots of this particular snag by the bank cutaway?

(Testimony of William Cummins.)

A. No; I didn't notice that.

Q. Now, getting back to timber sales, you say that because of the steepness of this area it wouldn't be feasible. Now, isn't it true, Mr. Cummins, that there are timber sales in areas in Lane County where the area is steeper than this? A. Yes.

Q. Yes. Now, you say that when the Highway Department wants to cut a tree it comes to you for permission. Now, I take it that you have the sole determination in your office as to whether or not a tree is dangerous or not. Isn't that right? Just because they come to you and say it's dangerous it doesn't mean it's dangerous as far as you're concerned? A. That's right.

Q. So I take it that is what Mr. Sage means when he says a tree is dangerous and then you reserve the right to determine [62] if it is dangerous or not; is that correct?

A. We have the final authority to give the permit.

Q. Yes.

A. We have very few disagreements.

Q. Now, did you know that there are about 25 new homes there just across the Hells Gate Bridge near the motel that you spoke about, 25 family units living right there?

A. There is—that—there is a family—there is a building group, but it's not just in this place I'm talking about. It's farther down the river. That's correct.

(Testimony of William Cummins.)

Q. Well, it's just directly across the Hells Gate Bridge, is it not?

A. No. It's across the river and over on—off of the main—the new highway now.

The Court: About how far is that from where the tree fell?

The Witness: I'd say a mile.

The Court: About a mile?

The Witness: That's a guess.

Mr. Sahlstrom: No further questions. Thank you.

Redirect Examination

By Mr. Luckey:

Q. Mr. Cummins, with reference to the sales on steep land, do you know of any sales for one dead snag on land as steep [63] as this? A. No.

Mr. Luckey: That's all.

The Court: Call your next witness.

Mr. Luckey: The defendant will rest, your Honor.

The Court: Rebuttal?

Mr. Sahlstrom: No rebuttal. I would offer one more Plaintiff's photograph.

The Court: It is admitted.

(Further discussion followed, not transcribed.) [64]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Jack Ellis, an Official Reporter of the above-entitled Court, do hereby certify that on May 14, 1958, at Eugene, Oregon, I reported in stenotype the proceedings had in the above-entitled matter, that I thereafter caused to be reduced to typewriting under my direction an excerpt from the proceedings so reported by me, and that the foregoing transcript, constituting Pages 1 to 64, both inclusive, constitutes a full, true and accurate transcript of said excerpt so reported by me in stenotype on said date, as aforesaid.

Dated at Portland, Oregon, this 19th day of July, 1958.

/s/ JACK ELLIS,
Official Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pretrial Order; Opinion of Judge Solomon; Findings of fact and conclusions of law; Judgment; Notice of appeal; Bond for costs on appeal; Statement of points and designation of record on appeal; Defendant-appellee's counter-designation

of record on appeal; Order to transmit exhibits to Court of Appeals and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9266, in which Dewey J. O'Brien is the plaintiff and appellant and United States of America is the defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's "Excerpt from Proceedings" filed in this office. Plaintiff's exhibits 2 and 6, and defendant's exhibits 1 to 17; 20; 21; 24 to 26 and 27 to 34 are being forwarded under separate cover. Plaintiff's exhibit 7 and defendant's exhibit 18 are being forwarded by the attorneys for plaintiff.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 16th day of January, 1959.

[Seal]

R. E. DE MOTT,
Clerk;

By /s/ THONA LUND,
Deputy.

[Endorsed]: No. 16335. United States Court of Appeals for the Ninth Circuit. Dewey J. O'Brien, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 19, 1959.

Docketed: January 26, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States
COURT OF APPEALS
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

E. B. SAHLSTROM,
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FILED
JUL 18 1959
PAUL F. O'BRIEN, CLERK

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United States
COURT OF APPEALS
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

BASIS OF JURISDICTION

This is an action for damages against the United States of America for personal injuries, based upon the alleged negligence of the defendant (R. 12, 13). It is stipulated in the Pre-Trial Order that the action was commenced under the Federal Tort Claims Act of June 25, 1948, 28 USCA § 1346(b) and 28 USCA § 2674 (R. 10).

On the 24th day of October, 1958, the Hon. Gus J. Solomon, District Judge, entered judgment in favor of defendant (R. 30). On December 17, 1958, plaintiff filed his notice of appeal (R. 31). This Court has jurisdiction of the appeal under the provisions of 28 USCA § 1291.

STATEMENT OF THE CASE

Plaintiff suffered the personal injuries which are the basis of this action when a dead tree located on forest lands belonging to the United States fell across the highway, striking the truck in which he was a passenger (R. 10). He brought this action under the Federal Tort Claims Act, and the segregated issue of liability was tried to the District Court (R. 10).

Plaintiff relied upon the admitted fact that the defendant had not inspected the snag before the accident (R. 10), the fact that the tree was visible from the highway (R. 40), was obviously dead (R. 40) and had been dead for many years (R. 62). Defendant contended that the tree was not readily visible (R. 40), that a dead tree was not necessarily a dangerous tree (R. 27), and that in any event, there was no duty on the part of the United States to inspect trees growing along a rural highway in order to protect travellers from the danger of dead trees falling (R. 14).

The trial court found that the Forest Service employees knew that it could reasonably be anticipated that some of the trees in the tract in question would be

dead, but that they did not know of the existence or condition of the particular tree which injured plaintiff (R. 26-27). He concluded that, although the question was one of first impression under Oregon law (R. 22), the Oregon court would not impose upon landowners the duty to inspect and remove dangerous trees along rural roads (R. 25). He therefore held that there was no duty on the part of the United States to inspect its property for the purpose of preventing injury to travelers on the highway and that there had been no negligence on the part of defendant (R. 29).

SPECIFICATIONS OF ERROR

1. The Court erred in making the following Conclusion of Law (R. 29):

“2. Under the facts of this case, the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed.”

Plaintiff contends that the Court should have found that the defendant United States had a duty to make such an inspection as a reasonable and prudent landowner would have made under the same or similar circumstances, for the purpose of seeing to it that its use of its own property did not involve an unreasonable risk to persons lawfully using the public highway.

2. The Court erred in making the following Finding of Fact (15) and Conclusion of Law (3) (R. 28, 29):

"15. The failure of the Defendant's employees to inspect the trees which fell was not negligence, and neither the United States nor any of its agents or employees was guilty of any negligent or wrongful act or omission proximately causing damage to the plaintiff."

"3. The injury to the Plaintiff was not caused by the negligence of the United States or its employees."

Plaintiff contends that the Court should have found that the admitted failure of the defendant to make any inspection whatsoever was negligence; that on the facts of this case the defendant had at least constructive notice of the danger from the dead tree, and that its failure to take any steps to protect the travelling public was negligence. The Court should then have determined whether such negligence was a proximate cause of plaintiff's injuries.

SUMMARY OF ARGUMENT

The trial court erred in determining that there was no duty imposed upon the owner of land adjoining a highway to inspect timber growing thereon for the purpose of safeguarding travellers upon the highway. The imposition of a duty does not necessarily mean a responsibility to actually conduct an inspection; it simply means that defendant, which obtains the economic benefit of the timber, should also have placed upon it the economic burden of either preventing loss, or providing compensation for avoidable injury. The economic burden thus imposed, by way of either inspection or insur-

ance, is not large, whereas the economic burden placed upon the innocent injured party may be tremendous.

The cases upon the subject are divided, but legal scholars agree that the trend in the field of damage caused by trees falling across highways is toward the imposition of liability. The Oregon Supreme Court has uniformly held that the standard of reasonable care is all-pervasive. Even though the care required from situation to situation may vary, the standard remains the same.

Applying that standard to this case, the conclusion is that reasonable care required some duty of inspection. Whether the inspection would have been such as to discover and remove this particular tree, thereby preventing the injury to plaintiff, is a factual issue which the trial court did not find it necessary to determine because of his conclusion that there was no duty to inspect. The cause should therefore be remanded for the application of the appropriate standard of care to the facts of the case.

ARGUMENT

A. Introductory Statement.

The issue presented by this case is what, if any, responsibility does the owner of property adjoining a highway have for the safety of the traveling public with respect to dangers caused by the existence of natural conditions upon the landowner's property. The problem arises in the context of the Federal Tort Claims Act (28

USCA § 1346(b)). The factual circumstances are that a tree adjoining a highway in the Willamette National Forest fell across the highway and struck the vehicle in which plaintiff was riding, causing him severe injuries.

It was admitted that the defendant had made no inspection of the area for dangers to the highway (R. 10). The trial court concluded that there was no duty upon the part of the government to make any such inspection (R. 29). He therefore found that the government was not liable to plaintiff and entered a judgment in its favor (R. 30).

It is axiomatic that the issues of this case are to be determined by Oregon law, that being "the place where the act or omission occurred." 28 USCA § 1346(b). It is agreed by all concerned, including the court below (R. 22), that there are no Oregon cases in point, and it therefore becomes the duty of the Court to make a prediction as to what rule the Supreme Court of Oregon would adopt if the question were before it. There does not, in fact, even appear to be any closely analogous authority in Oregon, such as a decision on some other aspect of a landowner's liability to persons outside the land for other types of natural conditions.

An Oregon case which does have some bearing on the subject, in that it involved the logging industry and the effect on natural conditions of certain activities thereof, is *Schweiger vs. Solbeck*, 191 Or. 454, 230 P. 2d 195 (1951). In that case, a logger permitted slashings to accumulate in a ravine, which combined with a landslide

and an unusually heavy rainfall to cause a diversion of the natural flow of water resulting in a washout and damage to plaintiff's property. The Court stated:

"It would seem, therefore, that, even assuming that there was a landslide, the negligence of the defendants in permitting an accumulation of logging debris to remain on their land might well have been a cause concurring with the landslide to bring about the injury, in view of the tendency of the soil to slide when saturated with water. Act of God, under those circumstances, would not be a defense."

This case not only establishes the duty of a landowner in Oregon to take into account relevant natural conditions in connection with the exercise of due care in the use of his property, but also demonstrates that, contrary to the implication of the trial judge's opinion, there has been no reluctance upon the part of the Oregon Court to impose upon the lumber industry the burdens of so operating its business as not to cause injury to others.

B. The Decisions of Other Courts.

The decisions from other jurisdictions relating to falling trees, including a number of English and Canadian cases, are collected in an annotation at 11 A.L.R. 2d 626. These authorities demonstrate that the courts have gone in a diversity of directions when confronted with this issue, and have considered a variety of factors in reaching their decisions.

Two Circuit Courts of Appeal have considered the question. In *Chambers vs. Whelen*, 44 F. 2d 340 (C.C.A. 4, 1930), the Court held that no duty of inspection ex-

isted where a person was injured by the falling of a dead tree while traveling along a public highway in a rural area. In that case, the statutes of West Virginia expressly required highway officials of the state to remove all dead timber standing within fifty feet of the highway, and imposed no such duty on the landowner. The Court affirmed the judgment sustaining a demurrer.

On the other hand, in the later case of *Brandywine Hundred Realty Co. vs. Cotillo*, 55 F. 2d 231 (C.C.A. 3, 1931), the Court held that a judgment for plaintiff must be affirmed, in a case arising from the fall of a dead tree on a tract of suburban forest land abutting a road. The tree had been dead for four years, but bore no exterior evidence of decay.

The Court stated:

"After all is said and done, this case turns on the application of the time honored principle of law, 'sic utere tuo ut alienum non laedas'—so use your own as not to injure another. Of the right of the plaintiff to drive along the public road there can be no question. And of the duty of an abutting landowner to so use his property on his own land that it shall not cumber the highway and endanger the safety of those using it there would seem to be no doubt. Responsibility for the control of one's property is one of the burdens of ownership, and, as a landowner has the right to enjoy his property unhampered by the actions of his abutting neighbor, so his abutter, whether the abutter be a neighbor or the traveler using a highway, is entitled to the same immunity."

The Court therefore held that the landowner would have a duty to exercise reasonable care and diligence to

prevent the tree from falling if its condition was known or in the exercise of reasonable care could have been known. A petition for rehearing was denied.

In the case of *Medeiros vs. Honomu Sugar Co.*, 21 Hawaii 155 (1912), the Court held that the liability of a landowner for a tree falling from rural land adjoining a highway rested upon the same principle as that of the owner of a building or any other structure abutting a street.

In *Brown vs. Milwaukee Terminal Railway Co.*, 199 Wis. 575, 224 N.W. 748, 227 N.W. 385 (1929), the Court, on rehearing, affirmed a jury verdict for plaintiff. In that case, the tree was in an urban area, but that fact did not seem to be of significance to the Court's opinion. In answer to specific interrogatories, the jury had found that the tree was dangerous and that the defendant should have known it in the exercise of ordinary care in time to remove it. The Court held that a cause of action for damages for the maintenance of a nuisance had been established.

Also finding liability is an English decision, *Brown vs. Harrison*, 177 L.T.R. (N.S.) 281 (C.A. Eng. 1947); and a Canadian decision, *Lamarche vs. Les Reverends Peres Oblats*, Rap. Jud. Quebec 29 C.S. 138 (1905).

In what is apparently the most recent American decision on the subject, *Hay vs. Norwalk Lodge No. 730, B.P.O.E.*, 109 N. E. 2d 481 (Ohio App., 1951), the Court followed very closely the analysis of the *Cotillo* case, *supra*. It held that the maxim that one must so use his

own property as not to injure another governed, and repeated the comment that, "Responsibility for the control of one's property is one of the burdens of ownership." The Court held that the governing standard was one of reasonable care.

In determining that the complaint stated a cause of action, the Court relied upon the fact that actual notice was alleged, and stated that there was no duty to inspect trees growing on rural land. The land in this case was not commercial timber land, but merely rural land on which an old tree was growing. That even the statement made about inspection was too strong, however, is shown by the Court's later statement, as follows:

"If the danger is apparent, which a person can see with his own eyes, and he fails to do so with the result that injury results to a traveler on the way, the owner is responsible because in the management of his property he has not acted as a reasonably prudent landowner would act."

Thus, applying the standard of reasonable care to the facts of this particular case, the Court determined that there is at least a duty to look and to see what is obvious, even if there is no duty to make a detailed inspection. Clearly, some duty is held to exist, and it is measured by the standard of reasonable care.

C. The Real Issue Is Who Must Bear the Burden.

The resolution of the issue presented by this case presents a policy question to this court for determination. The trial court very frankly placed his decision upon economic factors, and upon his belief that the im-

position of a duty to inspect would be an "intolerable burden on the landowner" (R. 24). He stated (R. 25):

"The economy of Oregon is largely dependent upon the lumber industry. Millions of acres of land in Oregon are in natural forests. It is unthinkable that the Oregon courts would impose upon the owners of forest lands, adjacent to little-used roads in sparsely-settled areas, the duty to inspect and remove trees which are likely to fall because of natural decay."

Plaintiff also believes that economic factors should determine the ultimate result of this case, but approaches the issue from an entirely different point of view. We respectfully submit that the fallacy in the learned trial court's analysis arises from an uncritical use of the word "duty." A duty in law is not at all the same kind of moral imperative as is a duty in ethics or religion. It is merely a correlative of the right of plaintiff to travel safely. When we place upon a landowner a duty to inspect, we do not necessarily intend or expect that he will in fact make an inspection. We are simply placing upon him the economic burden of any loss which may be caused by a disaster which could have been avoided had he done so.

As stated by Dean Prosser in his work on Torts (2d ed., p. 172):

"The real problem, and the one to which attention should be directed, would seem to be one of social policy: whether the defendants in such cases should bear the heavy negligence losses of a complex civilization, rather than the individual plaintiff. Because these defendants are in large measure public utilities, governmental bodies, industries, automobile

drivers, and others who by rates, prices, taxes or insurance are better able to distribute the loss to the general public, many courts may reasonably consider that the burden should rest upon them, and experience no great difficulty in finding a 'duty' of protection. So far as policy is concerned, different answers might well be given in different communities, according to the view that is taken as to where the loss should fall; but the issue is not to be determined by any talk of 'duty' or an assumption of the conclusion."

It is possible to question whether the making of an occasional, visual inspection of 3000 miles of road (not all of it public) through the Willamette National Forest would be such an intolerable economic burden as the trial court apparently believed, but that is not the point. As a practical matter, it is most unlikely that such an inspection would be made, although the imposition of a duty might, in the most obvious and serious cases, cause dangerous trees to be removed which might otherwise be ignored. The consequence of such a duty would not be an intolerable economic burden; it would merely require the government, in the case of government timber, or the private landowner, probably through insurance, to assume the economic burdens of avoidable losses caused by the timber from which he obtains such substantial economic benefits. A "duty to inspect" is merely a way of placing on the owner of the timber the liability to compensate a person injured by the failure to take a feasible precaution.

It hardly needs stating that there are many circumstances under which a "duty" is imposed, with no in-

tention that the duty be in fact fully carried out. Under the Oregon Employers' Liability Act, O.R.S. 654.305, et seq., for instance, all persons engaged in work involving risk or danger to employees are required to "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." No one really expects that the employer will search the world over for every practicable safety device, such as one used in Switzerland, but unknown in this country (*Camenzind vs. Freeland Furniture Co.*, 89 Or. 158, 174 P. 139 (1918)); it is merely intended that if the employee is injured through the failure to take a practicable precaution, the employer must compensate him for the injury.

Similarly, no one seriously expects the operators of elevators or of common carriers to use the "highest degree of skill and foresight consistent with the efficient use and operation of said elevator." *Kelly vs. Lewis Inv. Co.*, 66 Or. 1, 133 P. 826 (1913). The duty imposed is merely another way of saying that the failure to take such precautions will subject the operator to liability to a person injured. Again, it is not anticipated that the bottlers of soft drinks will investigate each and every bottle going out of their plant for mice or cigar stubs; nevertheless, a duty is imposed to see to it that no such foreign substances are found therein, if reasonable care could have prevented such a result. *Keller vs. Coca Cola*

Bottling Co., 67 Or. Adv. Sh. 197, 330 P. 2d 346 (1958). Examples could be multiplied indefinitely.

The trial court apparently fails to recognize that by his opinion he places the entire, intolerable economic burden upon plaintiff. Plaintiff was an innocent traveler along a public highway. He could not have done anything about this tree had he been aware of it. Defendant owned the land on which the tree was located, and did not permit even the State Highway Department to remove such trees without first obtaining defendant's permission for the removal of each individual tree (R. 51, 72, 87), a permission which was not always granted (R. 72). One of the trees fell, and plaintiff was injured. The court holds that the economic burden of this occurrence must be borne entirely by plaintiff.

In actual fact, the very reasons which the court advances for the unthinkability of inspection—that the roads are little used and in sparsely settled areas—render the economic burden light indeed. As the Court pointed out in *Chambers v. Whelen*, the danger, “in the case of rural lands upon a country road, is, to say the most, a very remote one.” For that very reason, the economic burden of insurance against such a loss is not likely to be substantial. The economic burden upon the unfortunate individual who, deriving no advantage from the timber, finds himself crushed by it, is immense.

The issue, then, is not one of whether there is a duty to inspect. This, as Dean Prosser points out, is assuming the conclusion. The real issue is whether the landowner or the innocent member of the traveling public must

bear the burden of a disaster which could, by an appropriate expense of time, money and effort, have been avoided. We do not suggest that there is an absolute liability. For a true Act of God, the landowner is not liable. But where he could, by taking reasonable precautions, have prevented the accident from occurring, we submit that it is a question for the trier of fact whether a reasonable man would have taken such precautions, and whether their omission was a proximate cause of the injuries which occurred.

The trend of tort law in all areas has been to broaden the base of liability for injuries due to avoidable causes. Under the opinion of the court below, the landowner is entitled to sit back, reaping the harvest of the economic wealth of his forests, and say to the traveling public: "By traveling on the public roads through my lands you assume the risk of any dangers that may exist. If a tree falls, that is your hard luck, not mine. I do not have to take any steps to prevent it happening, or even permit others to do so, and I do not have to pay any compensation if it occurs."

We submit that rather than take this position, the Oregon Supreme Court would, if the question were presented to it, follow the trend of tort law the country over and place the duty—that is, the economic burden—on the only person who is not only able to spread the risk, but to avoid it.

D. The Standard of Reasonable Care Should Apply.

Such a decision would be in accordance with general principles of tort law as applied in Oregon. The trial

court's decision carves out an area of immunity from liability; an area in which an individual is under no obligation to use any care whatsoever for the protection of his fellows. In all areas of tort law, in Oregon, however, the standard of care required is that of the ordinary prudent man. As the Court recently stated in *Biddle vs. Mazzocco*, 204 Or. 547, 554, 284 P. 2d 364 (1955):

"Negligence, in the absence of statute, is defined as the doing of that thing which a reasonable person would not have done, or the failure to do that thing which a reasonably prudent person would have done, in like or similar circumstances; it is the failure to exercise that degree of care and prudence that a reasonably prudent person would have exercised in like or similar circumstances. Ordinary negligence is defined in other words, but in the final analysis, and in every definition, the test of the conduct under consideration is based upon the conduct of a reasonably prudent person in like or similar circumstances."

Moreover, this standard does not change. Circumstances may change, necessitating a different degree of care, but the standard is always that of an ordinarily prudent person. *Sullivan vs. Mountain States Power Co.*, 139 Or 282, 298, 9 P. 2d 1038 (1932). The care to be exercised is proportionate to the seriousness of the possible consequences, and a high degree of danger calls for a high degree of care, which, under those circumstances, is ordinary care. *Suko vs. Northwestern Ice Co.*, 166 Or. 557, 571, 113 P. 2d 209 (1941). As the Court noted in the *Suko* case, in which liability was imposed for the collapse of a water tank:

"The location of the tank here involved, above a busy thoroughfare in a large metropolis, required a

greater degree of care in its maintenance and use than would have been the case had it been located in a remote and 'lonely' district."

The important point, however, is that the standard of ordinary care follows the tank whether it is above a crowded thoroughfare or in a lonely district. Likewise, the standard of ordinary care follows the landowner whether his land be alongside a city thoroughfare or in a rural district. Whether a reasonable inspection, under the circumstances of this case, would have discovered the danger of this tree, which had been rotten for fifteen or twenty years (R. 62), was for the trier of fact to determine. An inspection for dead trees sufficient to include this area at least once every ten years does not seem to be such an intolerable burden, and perhaps a trier of fact might consider it reasonable. Perhaps he might impose a higher standard, in view of the dangers, but the yardstick of the ordinary reasonable man is always the test.

E. "Judicial Legislation" Is Recognized by the Oregon Court as Necessary and Desirable.

The creation of a new "duty" by "judicial legislation," although it appears to alarm some courts, has not disturbed the Oregon Supreme Court in the recent past. In the landmark decision of *Hinish vs. Meier & Frank Co.*, 166 Or. 482, 504, 113 P. 2d 438 (1941), that Court embraced the doctrine of a right of privacy, relying not only upon English and American decisions, but upon the views of legal scholars as expressed in law reviews and treatises. The Court stated, at 166 Or. 504:

"We should not be deterred by fear of being accused of judicial legislation. Much of our law is judge-made, and there are those who think that it is the best law. Cardozo, 'The Growth of the Law', p. 133. The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues. The so-called 'family purpose doctrine', approved by this court in *McDowell v. Hurner*, 142 Or. 611, 13 P. (2d) 600, 20 P. (2d) 395, 88 A.L.R. 578, is a creation of the courts, and so, as Mr. Justice Bailey points out in the opinion in that case, are the defenses of fellow-servant, assumption of risk and contributory negligence. Courts cannot, of course, as Sir Frederick Pollock says in 'The Expansion of the Common Law', p. 49, 'lay down any rule they choose'. He continues, however: 'They may supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require; but they must not reverse what has been settled.' "

This very language has been quoted with approval as recently as 1954 in the case of *Kleinschmidt vs. Matthieu*, 201 Or 406, 414, 269 P. 2d 686 (1954), in imposing a theretofore non-existent liability for libel by will. The Court reviewed the few authorities on the subject, and cited with approval the works on torts of Dean Prosser and Professor Harper.

Similarly, in recent decisions, the Court has created a liability of a father to a minor child for wilful misconduct in *Cowgill, Adm'r vs. Boock, Adm'r*, 189 Or 282, 218 P. 2d 445 (1950); has established a liability of one spouse to another for an intentional tort in *Apitz vs. Dames*, 205 Or. 242, 287 P. 2d 585 (1955); and has established the right of a child to sue for a prenatal

tort in *Mallison vs. Pomeroy*, 205 Or. 690, 291 P. 2d 225 (1955). Only in the *Cowgill* case, of all the five cases cited, was there any dissent from the decision of the Court. In the *Kleinschmidt* and the *Mallison* cases, the Court particularly noted that Article 1, Section 10 of the Oregon Constitution, provides for remedy by due course of law to every person for injury done to him in his person or reputation (201 Or. at p. 415; 205 Or. at p. 697).

Moreover, in *Smith vs. Smith*, 205 Or. 286, 288, 287 P. 2d 572 (1955), in denying a liability of one spouse to another for a negligent tort, and determining that the Constitutional provision above-cited did not apply, the Court quoted with approval the following language from the *Cowgill* case:

“ ‘Whatever may be the early common rule, we should not be bound thereby unless it is supported by reason and logic. The law is not static. It is a progressive science. What may have been a wholesome common law rule a hundred years ago may not be adapted to the changed economic and social conditions of this modern age. In *Rozelle v. Rozelle*, 281 N.Y. 106, 112, 22 N.E. (2d) 254, 123 A.L.R. 1015, it is said:

“ ‘ ‘The genius of the common law lies in its flexibility and in its adaptability to the changing nature of human affairs and in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared.’ ”

“Again, in the concurring opinion of Justice Rossman, we read:

“ ‘ * * * Society is not static and conduct is in a continuous state of flux. Mankind is constantly

altering the social value it places upon different phases of life. The law must keep pace with life and develop with the expanding enlightenment of the age.' 189 Or 282, 302."

Plaintiff does not suggest that these decisions furnish any authority for the Court in this case to hold that a duty here exists which was not recognized at common law. It is merely intended to establish that the Oregon Court is aware of its common law power and responsibility to make reasonable adaptations of the rights and liabilities of the citizens of its state to changing economic and social conditions; and that it has not been afraid of what has been called "judicial legislation" when such action by a court is not only approved by the weight of legal scholarship but appears desirable and just. Let us, therefore, examine what legal scholars have to say on the subject in question.

F. Legal Scholars Find the Trend in the Direction of a "Duty" to Exercise Reasonable Care.

Significantly enough, the A.L.I. Restatement, long recognized as an authority by the Oregon Courts, although recognizing the general rule that a landowner is not responsible for dangers caused by natural conditions on his land, expressly excepts the present situation from the rule and states:

"The Institute expresses no opinion as to whether a possessor of land who permits trees not planted by himself or his predecessors to remain on a part of the land near a public highway is or is not under a duty to exercise reasonable care to prevent their condition becoming such as to involve a grave risk of causing serious bodily harm to those who use

the highway and the burden of making them safe is not excessive as compared with the risk involved in their dangerous conditions." 2 Restatement, Torts, 985, Sec. 363.

In other words, while taking no stand, the Restatement recognizes the possibility of a distinction between the tree situation and other natural conditions.

Professors Harper and James, *The Law of Torts*, Vol. 2, pp. 1522-1525, Sec. 27.19, state:

"According to the statements once widely made by commentators, the occupier's duty to prevent injury to persons or property outside his land from natural conditions on his own land is limited, if it exists at all."

The authors then go on to point out that this rule has not been uniformly followed, and assert:

"Indeed in the common case of trees which may fall or break and do damage outside the land, the rule in England and probably in most of our states today requires the occupier to use ordinary care to remedy a known dangerous condition, and probably even to discover it. The cases do not seem to pay much attention to the question whether the tree was planted or just grew. There is some indication, however, of a greater willingness to impose the duty in thickly settled than in rural or forest areas where the danger would be less and the burden of precaution greater."

In Prosser on Torts (2d ed.) p. 431, Sec. 75, the author states that the rule of non-liability for natural conditions was a practical necessity in the early cases and remains a necessity in rural communities. He suggests, however, that the ordinary rules as to nuisance should apply in the case of natural conditions, "and that it is

a question of the locality, the seriousness of the danger, and the ease with which it may be prevented."

Both of these works cite an article by Professor Goodhart, "Liability for Things Naturally on the Land," 4 Camb. L. J. 13 (1930), and one by Dix W. Noel, "Nuisances from Land in its Natural Condition," 56 Harv. L. Rev. 772 (1943). In the latter article, the subject of falling trees is discussed at pp. 786-791 and the author concludes:

"It is clear that the prevailing rule of non-liability for natural trees has received a distinctly limited application with reference to trees which endanger persons or property on the public highway. Where the tree is actually known to be dangerous, it seems to be established that the landowner is under a duty to make it safe. * * * With reference to rural property the rule is not so clear but there is considerable authority for imposing on the owner even of country property a duty to use care in discovering the danger. With the great increase of travel in modern times, and the growing tendency to protect travelers, the imposition on the landowner of the burden of due care in removing such menaces, according to nuisance principles, would seem to be justified in view of the grave harm threatened to users of the highways."

It is respectfully submitted that, despite the apparent reluctance of Dean Prosser to apply the rule to rural land, the standard remains the same in all of these discussions. Rural land, because of its remoteness, may require less care, but the landowner is not entitled to abdicate his responsibility to the public altogether. Furthermore, it is entirely possible that a different rule should be imposed upon a mere rural landowner with

trees on his land, and a landowner maintaining stands of commercially valuable timber for their economic benefit to him. In one case, the trees are a casual incident of the land; in the other, they are its major asset. The difference in economic value would be reflected in the degree of care which would be reasonably required.

G. The Trial Court's Legal Analysis Was Erroneous.

When all of the foregoing is applied to the facts of this case, we submit that it must be determined that the trial court followed the wrong rule of law. It is established that the tree in question had been dead for fifteen or twenty years (R. 62). It is established that it was visible from the highway, although how readily visible is a subject of some dispute (R. 40). Nevertheless, you could tell from the highway that a tree was dead (R. 40). It is admitted that no inspection or attempt at inspection was made (R. 10). It is established that, although in a rural area, the location in question was not far from a community (R. 52); it was near certain tourist facilities (R. 52); it was on the highway between two small towns in Oregon (R. 36), and could reasonably be described as "heavily-traveled" (R. 53-54), and it was traveled hundreds of times annually by employees of the Forest Service (R. 39, 41). It is admitted that an examination of the tree would have revealed that it was rotted and likely to fall (R. 48-49). Under these circumstances, we respectfully submit that questions of fact arose as to whether a reasonably prudent man, as the owner of this timber, would have conducted such an inspection as would have dis-

closed the existence and danger of this tree, and would have done something about it. The record also presents questions of fact as to whether the failure to make such an inspection was the proximate cause of the injuries to plaintiff. The trial court, however, failed to make these factual determinations, because he proceeded from the premise that there was no duty to inspect and hence that the admitted failure to do so was not negligence (R. 28-29).

The application of an erroneous principle of law basic to plaintiff's cause of action vitiates the entire decision of the trial court. Cf. *Wilson vs. United States*, 250 F. 2d 312, 324 (C.A. 9, 1957). It is respectfully submitted that this case must be remanded to the trial court with instructions to apply to the government's admitted failure to inspect the trees growing along the highway the appropriate standard, and determine whether the failure to inspect was, under the facts presented in this case, a negligent omission proximately causing the plaintiff's injuries. If such it was, plaintiff is entitled to recover his damages.

CONCLUSION

Plaintiff respectfully submits that the standard of reasonable care applies to this situation as well as to virtually all others presented in tort law. If the issue were to be presented to the Oregon Supreme Court, it is respectfully submitted that they would so determine.

This being the case, the decision of the court below is erroneous, and its judgment should be reversed and the caues remanded for a new trial.

Respectfully submitted,

E. B. SAHLSTROM,
PHILIP A. LEVIN,
Attorneys for Appellant.

APPENDIX

TABLE OF EXHIBITS

Exhibit No.	Identified	Offered	Received or Rejected
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Pf. 7	R. 17	R. 35	R. 35
Pf. 11	R. 17, 55		
Df. 1-17	R. 18	R. 69	R. 69
Df. 18	R. 18, 43		
Df. 21	R. 18	R. 70	R. 70
Df. 24-26	R. 18	R. 70	R. 70
Df. 27-34	R. 18	R. 70	R. 70

United States
Court of Appeals
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

Appeal from the United States District Court
for the District of Oregon

C. E. LUCKEY,
United States Attorney,
District of Oregon,
Attorney for Appellee.

FILED

AUG 11 1959

PAUL P. O'BRIEN, CLERK

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NO. 16335

United States
Court of Appeals
for the Ninth Circuit

DEWEY J. O'BRIEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Appeal from the United States District Court
for the District of Oregon

OPINION BELOW

The court delivered a written opinion (R. 20-25) reviewing authorities and concluding that under the law of Oregon the appellee would not be charged with negligence under the facts of this case.

JURISDICTIONAL STATEMENT

Appellant commenced action under the Federal Tort Claims Act (28 USCA §§ 1346(b) and 2674) for damages, claiming injury from a tree which fell from forest land across a state highway. Appellee asserted the District Court's lack of jurisdiction by its Contentions III (R. 14 and VI (R. 15) and the question was reserved in the pre-trial order as an issue of law (No. V, R. 16, 17). The basis of this assertion by appellee was the discretionary function of the government's failure to provide funds for the inspection and elimination of roadside hazards to the traveling public (R. 50, 66, 67).

This appeal is asserted under 28 USCA § 1291.

QUESTIONS PRESENTED

(1) Under the law of Oregon did the appellee landowner have a duty to inspect trees on its vast holdings of rural forest lands growing in their natural state along many miles of abutting public highways maintained and patrolled by the State Highway Department, which had a practice of observing, and with permission, cutting danger trees along such public highways?

(2) Would the landowner's failure to inspect under such circumstances in itself be negligence?

(3) If the appellee was negligent, did the appellant sustain his burden of showing appellee's negligence to be the proximate cause of appellant's injury?

(4) Was the failure to provide funds for the removal of such trees a discretionary function, and any injury resulting therefrom not actionable under the Federal Tort Claims Act?

Question (4) need not be reached if the Court finds, as the District Court did, that the injury to the appellant was not caused by the negligence of the United States or its employees.

STATUTES INVOLVED

28 USCA § 1291

"Final decision of district courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 USCA § 1346(b)

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclu-

sive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USCA § 2674

"Liability of United States. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

28 USCA § 2680(a) and (b)

"Exceptions. The provisions of this chapter and section 1346(b) of this title shall not apply to - -

* * *

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in

the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

“(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”

FEDERAL RULES OF CIVIL PROCEDURE,
TITLE 28, USC

“Rule 52. FINDINGS BY THE COURT. (a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purpose of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule

41(b). As amended Dec. 27, 1946, eff. March 19, 1948."

STATEMENT OF THE CASE

November 13, 1956, a tree fell from rural forest land owned by the appellee and administered by the United States Forest Service, an agency of the U. S. Department of Agriculture. The tree was situated about 84 feet upward from a road abutting the defendant's land and about 112 feet from the center line of the 22-foot road (R. 36, 37, 42). The tree fell across the road and hit the car in which appellant was riding.

The tree was growing in a natural National Forest in its natural state in a rural area a few miles westerly from the town of Oakridge, Oregon. Its existence and condition were not known to agents of the defendant. The Forest Service had not undertaken the policing or inspection of rural forest lands abutting highways maintained by other public agencies to protect the traveling public against the possibility of injury from such trees and funds had not been made available therefor (R. 50, 66, 67).

On the other hand, the State of Oregon highway representatives had and have a practice and policy of patrolling such public highways and calling to the attention of the abutting owners, including the defendant, trees considered by the Highway Department to be dangerous to

the safety of travelers on the public highways, including this public highway at the time of the accident (R. 76; and see Defs. Exs. 1-17, incl., 21, 27-34, incl.) and of removing them with the permission of the Forest Service.

Appellant sought to charge the appellee with liability for damage caused by the falling tree, which appellant claimed was visible from the highway and would by inspection have been found dead, because appellee had not inspected the tree before the accident.

Appellee's evidence showed that the tree had not been inspected before the accident, and that it was not in a place to be observed except under unusual circumstances, but that the State of Oregon Highway Department patrolled and maintained the road, including observation of danger trees on abutting lands in connection with its appropriate duty of assuring the safety of the roads to the traveling public, and generally requested and obtained permission to cut trees believed dangerous, both live and dead. Appellee further offered evidence that a dead tree is not necessarily a dangerous tree and that no funds had been provided for the inspection and cutting of danger trees along such public roads. Further, evidence was introduced to show the many thousands of acres of land and miles of road traversing the same that the Forest Service administers in Oregon.

The trial court held *inter alia* that "*Under the facts of this case* the United States and its employees had no duty

to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed" and that the appellant's injury was under Oregon law not caused by the negligence of appellee or its employees (R. 29). (Emphasis supplied)

ARGUMENT

Appellant's ingenious but esoteric argument and appellate theory is summarized in his statement:

"A duty in law is not at all the same kind of moral imperative as is a duty in ethics or religion. It is merely a correlative of the right of plaintiff to travel safely. When we place upon a landowner a duty to inspect, we do not necessarily intend or expect that he will in fact make an inspection. We are simply placing upon him the economic burden of any loss which may be caused by a disaster which could have been avoided had he done so." (App. Br. 11)

Appellant avoids the Court's very important words "*Under the facts of this case*, the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed." (Emphasis supplied).

Reasonably, this Conclusion of the Court is a concise statement of the proposition that the Court has concluded that a reasonable, prudent landowner would not have in-

spected, and therefore the appellee's employees were not negligent in not inspecting — i.e., had no duty to inspect. "Duty" in ordinary negligence cases is translatable into the conduct of a reasonable, prudent landowner under like circumstances. Higher duty is imposed in certain type cases relied on by appellant relating to activities of common carriers inviting a special duty, and to employers engaging in hazardous industry upon whom statutes impose special employer's liability duties or cases involving merchantability of consumer goods. Those situations and cases are not comparable to the one at bar.

Appellee respectfully urges that a reasonable, prudent landowner would not have inspected the trees near the roadway because:

(1) The agency charged with operation of the roads and the safety of the traveling public had assumed and was charged with and exercising the function of inspection.

See *Chambers v. Whelen*, 4 Cir. 1930, 44 F. 2d 340 at 341-342, wherein the Court said:

"While the fact that a duty is imposed upon public officials to maintain the safety of a street or highway does not necessarily absolve an abutting owner from duty with respect thereto, it is at least worthy of note that the Legislature of West Virginia has imposed upon the highway officials of that state the duty of removing all dead timber standing within fifty feet of a highway (Barnes West Virginia Code, c. 43, § § 21,

71, and 122), and that no such duty is imposed upon the landowner. On the contrary, the only statutory provision affecting the landowner in such matters is section 187 of chapter 43 of the Code, which makes it a misdemeanor to 'kill a tree and leave it standing within a distance of fifty feet of any public road,' a provision which imposes liability, criminal as well as civil, where the death of the tree is due to the act of the landowner, but has no application where it has died as a result of natural causes. In the early days of the Republic, the mere suggestion that it was the duty of a landowner to inspect trees on rural lands would have excited ridicule. Subsequent legislation in West Virginia has placed the duty, not on the landowner, but on those whose duty it is to maintain the safety of the highways.

"This statutory policy touches, we think, the real heart of the question. The inspection and removal of trees standing near a highway is, in substance, not a matter affecting the use of the abutting property, but a matter affecting the safety of the road. While, of course, it is the duty of abutting owners not to create or maintain upon their premises what may be a source of danger to travelers on the highway, it is the duty of the highway officials, and not the duty of abutting owners, to make the highway safe for the use of the public; and the duty of inspection would seem to rest upon those whose duty it is to make the highway safe. It is hardly thinkable that by building a country highway through the lands of a private owner, the public should impose upon him the duty of inspecting trees or other objects for the purpose of making the highway safe.

"The removal of such as may become dangerous through decay is not a matter of interference with private property, as in the case of removal of a building or of an ornamental shade tree, but is a mere matter of maintaining the safety of the highway, a duty imposed by law upon the road officials, which the owner of the property has a right to assume that they have performed. To hold, in such case, that the duty of inspection exists, would be to charge the owner with responsibility for dangers arising from the natural condition of the country through which the road runs. Is the owner of mountain land to be held liable for failure to inspect because a boulder rolls from his land on the mountain side to the highway, or because there has been a landslide, or because water flowing in natural course from his land has frozen upon the highway? If not, we see no ground upon which liability in a case such as this can be imposed."

The remarks of the author in *Prosser on Torts*, West Publishing Co., 1941, at page 605, are also appropriate:

"The traditional rule of the English and American courts has been that the possessor of land is under no affirmative duty to remedy conditions of natural origin upon his premises, although they may be dangerous or inconvenient to his neighbors. Thus it has been held that he is not liable for the existence of a foul swamp, for the spread of weeds or thistles growing on his land, for the normal flow of surface water, or for the fall of a decayed tree upon a public road or an adjoining house. Closely allied with this is the generally accepted holding that an abutting owner is under no duty to remove ice and snow which has fallen naturally upon

the highway. On the other hand, if he himself altered the condition of his premises, as by erecting a structure which discharges water upon the sidewalk, damming a stream so that it forms a malarial pond, planting poisonous trees near his boundary line, or piling sand where the wind may blow it, the condition is no longer a natural one and he may be liable for the damage resulting from his negligence.

"The rule of non-liability for natural conditions was obviously a practical necessity in the early cases, when land was very largely in a primitive state. It remains a necessity in rural communities, where the burden of inspecting and improving the land would be out of all proportion to the harm usually threatened."

(2) The risk of danger in a rural area was so small as to make inspection by the landowner of vast timber holdings a burden or duty unreasonable under the conditions existing herein.

(3) A dead tree is not necessarily a dangerous tree and thus inspection would not necessarily or reasonably insure the safety of the traveling public and thus a reasonable, prudent landowner would be unlikely to undertake inspection.

(4) Appellant concedes that: "As a practical matter, it is most unlikely that such inspection would be made . . ." (App. Br. 12). Appellant would require the impractical and label it negligence to not be impractical. Appellant would emphasize unduly the benefits of hindsight and

minimize standards of reasonable conduct.

Appellant argues for application of the Standard of Reasonable Care, contrary to his argument calling for the imposition of a special duty and a balancing of hardships (App. Br. 15).

The Court, appellee submits, has carefully applied the standard of reasonable care, and concluded that under the facts of this case, the employees of appellee had no knowledge of what ultimately proved to be a hazard, there was no negligence and no standard of reasonable care violated. The Court's opinion points out the division of the cases. It is argued that the cases aligned with the Court's holding arose in jurisdictions and under circumstances much more similar to the rural setting involved herein, common to Oregon law and its development, than did those *contra*. The former cases are therefore most persuasive, as are ordinary judgment and reason, for the Court's opinion. Appellee submits that the Court's opinion (R. 22-24) ably and fully treated the appropriate reported cases available for guidance.

What appellant seeks by a standard of reasonable care is implicitly found already in the Opinion, Findings and Conclusions of the trial court. Appellant suggests that the entire case was tried on an erroneous theory. The record does not support appellant's assertion. The Court received all testimony offered concerning the condition of the tree

and its location and observability. Appellant was not precluded from introducing any evidence at the trial on a theory preconceived concerning duty to inspect. The Court's Findings and Conclusions entered after mature consideration of the facts and the law, are that *under the facts of this case* the landowner had no duty to inspect and that no act or omission of appellee's employees wrongfully or negligently proximately caused appellant's injury.

The record does not support the statement (App. Br. 4) that the trial court determined that there was no duty imposed upon the owner of land adjoining a highway to inspect timber growing thereon for the purpose of safeguarding travelers upon the highway. The record supports a much narrower statement that the Court as trier of the *facts* and the law found as a fact that under the facts of this case the failure to inspect was not negligence — that under the facts of this case there was not reasonably to be imposed a duty absolute of inspection by the landowner of its natural rural forest lands bordering on public roads. The Court carefully points out the great burden such a duty would involve and further emphasizes the role of the State of Oregon Highway Department in assuming the burden of protection of the traveling public.

Actionable, ordinary negligence involves conduct which does not measure up to the test of the actions of a reasonable, prudent man under the same or similar conditions. If

one falls below that standard of action or care in such a manner as to cause injury to another, he may be said to have breached his duty to the injured party to exercise such care. He has no duty to do more than exercise the care of an ordinary, reasonable, prudent person acting under the same or similar conditions.

Implicit, then, in the Conclusion of Law No. 2, is the implication that a reasonable, prudent landowner would not have inspected the property "under the facts of this case", and therefore the defendant had no duty to do so. A conclusion of law need not be a treatise on the mental workings of the Court, but need only summarize the Court's application of the facts to the law.

The appellant would convert the failure of the appellee to inspect into negligence *per se*. The assertion is made that appellee had at least constructive notice of the danger from the dead tree, without any factual reference supporting the assumption. The existence of the tree, which the evidence showed was in fact not known to defendant's employees, is no basis on which to attribute even constructive notice to appellee.

The Court did not discuss, of all cases cited involving falling trees, the case of *Brown v. Milwaukee Terminal Ry. Co.*, 199 Wis. 575, 224 NW 748, 227 NW 388 (1929). At most, the case can be said to be one of those opposite the *Chambers v. Whelen* case, *supra*, and others which the

Court could properly choose to follow, particularly on their facts and the facts herein. Furthermore, as appellant acknowledges, therein the setting was an urban area, and the jury, in response to a specific interrogatory, found (we submit *under the facts therein*) that the tree was dangerous and that the defendant should have known it in the exercise of ordinary care in time to remove it. Herein the Court found that there was no negligence, i.e., that in the exercise of ordinary care, the appellee's employees would not have found the danger. That this is so because the Court found that ordinary, prudent landowners acting under these circumstances would not have inspected so as to have found it, does no violence to the *Brown v. Milwaukee, supra*, verdict that under the facts of that case a reasonable, prudent landowner would or should have known of that patently dangerous urban area tree, which was growing between a street curbing and sidewalk in the City of Milwaukee. The divided court first reversed the plaintiff's verdict and on rehearing affirmed it, holding that the complaint alleged and the verdict found facts amounting to nuisance. No nuisance in the case at bar is alleged, and the facts before the trial court and now before this Court do not support a proposition of maintenance of a nuisance by permitting such a rural tree in its natural state to remain standing.

Appellant urges judicial legislation to create a duty,

thereby implying, appellee asserts, correctly, that none was imposed before (App. Br. 17). He seeks to found this duty on a concept of balancing hardships. Such a concept is beguiling, but in the case herein should be crushed under the impact of its consequence, as the trial court's opinion points out.

In one hundred years of Oregon statehood, not one such case has been reported in Oregon Supreme Court litigation. The burden, then, of requiring such inspection is one all out of reason to the risk to the wayfarer. It is not the function of negligence law to impose liability without fault to provide accident insurance for the travelers on the public ways.

As this Court has aptly stated in *Union Pacific RR Co. v. Johnson*, 9 Cir. 1957, 249 F. 2d 674, at 679:

"Of course, in negligence cases there is always a certain amount of economic determination. It is perfectly foreseeable when one builds a railroad that at various country crossings negligent drivers will get their entirely innocent passengers on the crossing and get them killed by carefully driven trains. It is foreseeable that open country irrigation canals will prove attractive nuisances to children. Yet, without more we do not generally hold the railroads or canal companies in such cases. And we think the reason is that the world must go on and we do not impose a duty."

Appellant argues that Oregon law (*Schweiger v. Sol-*

beck, 191 Or. 454, 230 P. 2d 195 (1951)) contrary to the implication of the trial judge's opinion, has no reluctance to impose upon the lumber industry the burdens of so operating its business as not to cause injury to others. Appellee submits the case is not in point and appellant's interpretation of the trial court's opinion unfounded. The *Schweiger* case, *supra*, involved a created, artificial condition occasioned by logging. The trial court's opinion herein did not involve immunity for the lumber industry for artificially-created conditions, but more narrowly held that it would be unthinkable that the Oregon courts would impose upon the owners of forest lands (in their natural state in this case) adjacent to little-used roads in sparsely-settled areas, the duty to inspect and remove trees which are likely to fall because of natural decay.

The core of appellant's argument that the Court should by judicial legislation impose a duty of inspection is his assertion that a balancing of consequences should impose liability on the landowner because the landowner may obtain economic benefits from the standing forests. Appellant would substitute for a standard of due care, a standard of proportionate economic loss after an accident has occurred. Such a standard is unsupportable. Such doctrine ill becomes a philosophy of equal justice under law, which is the proud heritage of this nation, and the occasional, unavoidable, imperfect application of which is a torment to the judiciary.

Appellant's argument would require a liability not founded on negligence but on beneficial ownership, and perhaps require evaluation of the actual economic benefit to the owner as compared to the harm done the wayfarer. This departure is startling to contemplate.

The lip service necessarily given to an unchanging standard of care (App. Br. 16) accents the frailty of appellant's basic attack on the Court's opinion.

As the Supreme Court of the United States has stated in discussing the Tort Claims Act:

"Its effect is to waive immunity from recognized causes of action and not to visit the government with novel and unprecedented liabilities."

See *Feres v. U.S.*, (1950) 340 U.S. 135, at 142.

The case at bar was determined by the Court at a trial on the facts. The pretrial order conceded that no inspection had been made, but the question as to whether that lack of inspection involved negligence was resolved by the Court not as a question of law but as a fact, after hearing evidence of the circumstances, applying the standards of due care and considering the factors which would probably motivate a decision of an Oregon court in applying the facts to the law.

The able trial judge, experienced and well-informed on Oregon law, the Chief Judge of the United States District

Court for the District of Oregon, made Findings and Conclusions which should not be disturbed. There is ample evidence supporting his Findings, and his Conclusions are entitled great weight as interpretive of the law of the District wherein he sits. See *Henderson Co. v. Thompson*, (1937) 300 U.S. 258, at 266, wherein the Supreme Court has said:

“ in the absence of a definitive construction of the Constitution of the State by its highest court, we should defer to the federal court’s understanding of the state law.”

See also, *Pauling v. Pauling*, 6 Cir. 1947, 159 F. 2d 531 (cert. den. 331 U.S. 808), at 534, wherein the court said:

“The question is, moreover, one of local law, on which the considered opinion of the trial judge will be accorded great weight by this court.”

See also, *Elder v. Dixie Greyhound Lines*, 8 Cir. 1946, 158 F. 2d 200, at 204-5; *Citrigno v. Williams*, 9 Cir. 1958, 255 F. 2d 675, at 679, and *Bower v. Bower*, 9 Cir. 1958, 255 F. 2d 618, at 619.

Furthermore, the Court of Appeals should not disturb the Findings made by the trial court unless they are clearly erroneous. See *Kimberly Corp. v. Hartley Pen Co.*, 9 Cir. 1956, 237 F. 2d 294, at 300. Appellee respectfully submits that not only were the findings here not clearly erroneous,

but were clearly correct (See Rule 52(a), Fed. Rules of Civ. Proc.).

Appellant relies on *Sullivan v. Mountain States Power Co.*, 139 Or. 282, 298 P. 2d 1038 (1932). The case involved a forest fire found to have been caused by a falling tree's coming into contact with electrical transmission lines. The Court in that case emphasized the

" duty of the defendant to have used due care commensurate with the extremely dangerous character of the force it was engaged in transmitting in maintaining its wires " citing from *Greenwood v. Eastern Oregon Power Co.*, 67 Or. 433, 136 P. 336.

The *Sullivan* case, *supra*, and other electricity cases, involve an artificial, dangerous instrumentality. Electricity cases are not factually helpful herein.

Appellant also relies on *Suko v. Northwestern Ice Co.*, 166 Or. 557, 113 P. 2d 209 (1941). That case involved a water tank atop a building above a busy thoroughfare in a large metropolis. It was a created, rather than a natural condition. The Court gives a clue to its probable thinking if the facts of this case were before it, when the opinion points out the circumstances

" required a greater degree of care in its maintenance and use than would have been the case had it been located in a remote and 'lonely' district."

The tree herein, appellee repeats, was, as the Court opined,

growing in a natural state in a rural forest area — a “lonely” district.

From *Suko, supra*, appellant deducts that the Court herein should have determined whether a reasonable inspection under the circumstances would have discovered the tree, and suggests that an inspection every ten years would be a reasonable burden. The obvious response is that had the Court considered such inspection or duty to inspect reasonable, it would have concluded that under the facts such a duty did exist. The Court found otherwise. The argument is an artful misapplication of the Court’s Findings and Conclusions.

Finally, appellant argues that the Court failed to resolve questions of fact as to whether the failure to inspect was the proximate cause of the injuries to the plaintiff (App. Br. 24). Appellee does not so read the record (See Finding of Fact 15, R. 28).

In the pretrial order, appellant asserted liability of appellee charging a failure to warn. This assertion has not been pressed on appeal. It is submitted that in any event it is not chargeable to appellee. See *National Manufacturing Company v. United States*, 8 Cir. 1954, 210 F. 2d 263, cert. den. 347 U.S. 967.

CONCLUSION

The trial court received evidence and made Findings of Fact therefrom. The record indicates no exclusion of evidence offered by appellant. The Court applied the facts to the law of Oregon, wherein the Court was sitting, and rendered Judgment for the appellee. Appellant would require the Court to embark on judicial legislation to impose new and novel liability. There is no basis for disturbing the Court's Judgment. It should be affirmed.

Respectfully submitted,

C. E. LUCKEY

United States Attorney

District of Oregon

Attorney for Appellee.

August, 1959

No. 16340

United States
Court of Appeals
for the Ninth Circuit

STEVE WINN and EDITH WINN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Southern Division.

FILED

MAY - 5 1959

PAUL P. O'BRIEN, CLERK

No. 16340

United States
Court of Appeals
for the Ninth Circuit

STEVE WINN and EDITH WINN,

Appellants,

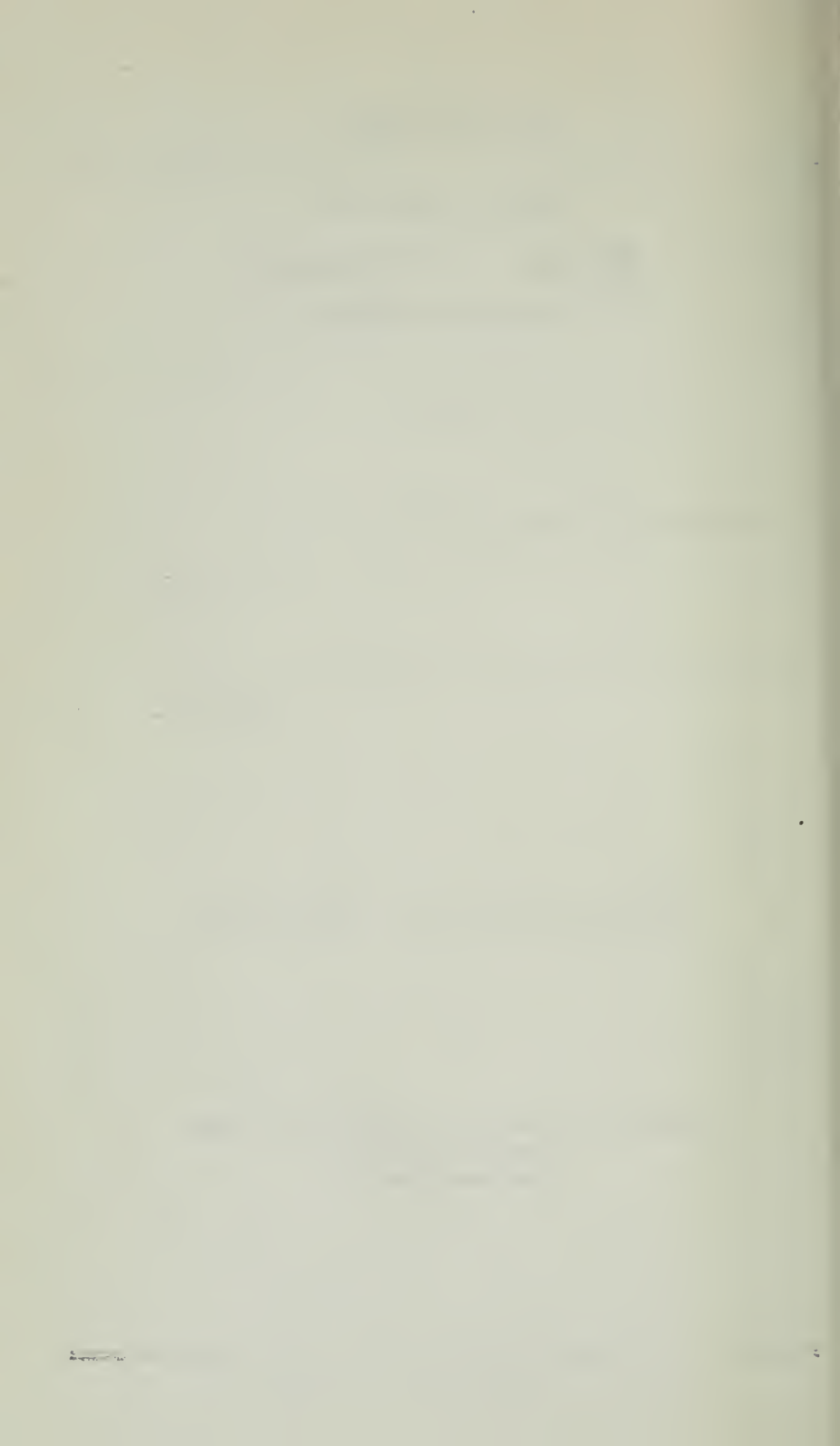
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the District of
Idaho, Southern Division

No. 3454

UNITED STATES OF AMERICA,

Plaintiff,

vs.

29.27 ACRES OF LAND, More or Less, in the
County of Elmore, State of Idaho; STEVE
WINN and EDITH WINN, Husband and
Wife; O. E. CANNON and ORA F. CAN-
NON, Husband and Wife; ELMORE
COUNTY, IDAHO, a Municipal Corporation;
ANY AND ALL UNKNOWN OWNERS,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America at the request of the Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States of America, for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. 257); the Act of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258(a) to (e)); and the "Federal-Aid Highway Act of 1956" approved June 29,

1956 (70 Stat. 374), authorizing the acquisition of land or interest in land (including within the term "interests in land" the control of access thereto from adjoining land) required for right of way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the National System of Interstate and Defense Highways, funds for such purpose being available from current appropriations for carrying out the provisions of the Federal Highway Act of 1921 (42 Stat. 212) and acts amendatory thereof and supplementary thereto.

3. The public uses for which said land is taken is to adequately provide for the construction, reconstruction, and improvement of Idaho Highway Project I-3022(7), a portion of the National System of Interstate and Defense Highways being constructed in accordance with standards, including control of access, adopted by the Secretary of Commerce in co-operation with the State Highway Departments.

4. The estates taken for said public uses are the fee simple title to Tracts Nos. 5 and 10, subject to existing easements for public roads and highways, together with all existing, future, or potential common law or statutory abutters' rights or easements of access to, from, and between said land and the abutting land of all parties having interest in said land; excepting and reserving, however, to the owner or owners of Tract 10 and to their heirs, successors,

and assigns the right of access to, from and between the right of way of the Mountain Home District East-West Connection Road and their abutting lands north of said right of way between Highway Stations 8/30 and 14/34, as shown generally on the plat of said tract included in Schedule "B" of the Declaration of Taking filed herein; there are also taken for said public uses all existing, future, or potential common law or statutory abutters' rights or easements of access to, from, and between that portion of the right of way of said connection road extending between Highway Stations 19/37 and 21/37 and the abutting northerly lands of all parties having interests in said portion of the right of way.

5. The property so to be taken is described in Schedule "A," hereto attached and made a part hereof.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are as follows:

Names of Purported Owners

Tract 5—Steve Winn and Edith Winn, husband and wife;

Tract 10—O. E. Cannon and Ora F. Cannon, husband and wife.

7. The County of Elmore may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the parties named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff and such persons are made parties to the action under the designation, "Any and All Unknown Owners."

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

BEN PETERSON,
United States Attorney;

By /s/ R. M. WHITTIER,
Assistant U. S. Attorney.

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ R. M. WHITTIER,
Assistant U. S. Attorney.

Schedule "A"

Legal Description
(Part to Be Taken)

Project No. I-3022(7), Interstate.

Land Situated in Elmore County, Idaho.

Parcel No. 5

A triangular parcel of land being on both sides of the Highway Survey line as shown on the official plat of U. S. 30—Project No. I-3022(7) Highway Survey on file in the office of the Department of Highways of the State of Idaho and lying over and across the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, Township 2 South, Range 5 East, Boise Meridian, described as follows, to wit:

Beginning at the Northeast corner of the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, Township 2 South, Range 5 East, Boise Meridian, which corner is approximately East 1320.0 feet from the Northwest corner of said Section 36; thence South along the East line of the said NW $\frac{1}{4}$ NW $\frac{1}{4}$ —512.0 feet, more or less, to an intersection with a line parallel with and Southwesterly 200.0 feet from the Highway Survey line of U. S. 30—Project No. I-3022(7); thence North 37° 52' West along said parallel line, 650.0 feet, more or less, to a point in the North line of the said NW $\frac{1}{4}$ NW $\frac{1}{4}$; thence East along said North line, 405.0 feet, more or less, to the Point of Beginning and containing 2.38 acres, more or less.

Highway Station reference: 1845/23 to 1847/65.

Parcel No. 10

An irregular parcel of land, being on both sides of the Highway Survey line as shown on the official plat of U. S. 30—Project No. I-3022(7)—Highway Survey on file in the office of the Department of Highways of the State of Idaho, and lying over and across the $SW\frac{1}{4}SE\frac{1}{4}$ and the $W\frac{1}{2}SE\frac{1}{4}SE\frac{1}{4}$ of Section 9, Township 3 South, Range 6 East, Boise Meridian, described as follows, to wit:

Beginning at the Northwest corner of the $SW\frac{1}{4}SE\frac{1}{4}$ of Section 9, Township 3 South, Range 6 East, Boise Meridian, which corner is approximately North 1320.0 feet from the South Quarter corner of said Section 9; thence East along the North line of the said $SW\frac{1}{4}SE\frac{1}{4}$ 1035.0 feet, more or less, to a point in a line parallel with and Northeasterly 200.0 feet from the Highway Survey line of U. S. 30—Project No. I-3022(7); thence South $76^{\circ} 09' 30''$ East along said parallel line 978.0 feet, more or less, to the East line of the $W\frac{1}{2}SE\frac{1}{4}SE\frac{1}{4}$ of said Section 9; thence South along the said East line, 412.0 feet, more or less, to a point in a line parallel with and Southwesterly 200.0 feet from said Highway Survey line; thence North $76^{\circ} 09' 30''$ West, along said last parallel line 1260.0 feet, more or less, to a point at right angles Southwesterly 200.0 feet from said Highway Survey line at Station 2093/79.02 a point on tangent; thence Southwesterly 230.0 feet, more or less, to a point in a line parallel with and 100.0 feet Northeasterly from the center line of the future "Westbound

Connection'' to the said Highway Survey, which point bears North $58^{\circ} 50' 30''$ East from center line Station 26/16.43 of said ''Westbound Connection''; thence South $31^{\circ} 09' 30''$ East, along said last parallel line, 950.0 feet, more or less, to the South line of the said $SW\frac{1}{4}SE\frac{1}{4}$; thence West along the said South line 815.0 feet, more or less, to a point in the South line of said Section 9, which point is in the Northeasterly right of way line of present U. S. Highway 30; thence Northwesterly 308.4 feet along a 5779.58 foot radius curve left, said curve having a central angle of $3^{\circ} 04'$ to a point in the West line of the $SW\frac{1}{4}SE\frac{1}{4}$ of said Section 9, which point is North 108.0 feet from the South Quarter corner of said Section 9 and which point bears Northeasterly and radially 50.0 feet from approximate center line Station 8/30, a point on curve of an ''East and West'' Connection Road; thence Easterly parallel with and Northerly 50.0 feet from said last center line along a 1382.33 foot radius curve left, 400.0 feet, more or less, to a point opposite Station 12/45.92 of said ''Connection Road,'' a point of tangent; thence continuing along said parallel line, South $89^{\circ} 31' 30''$ East 390.0 feet, more or less, to the point of intersection with a line parallel with and Southwesterly 150.0 feet from the center line of the ''Eastbound Connection'' to the said Highway Survey, said last point of intersection being approximately opposite Station 16/34 of the said ''East and West'' Connection; thence, along said last parallel line Northwesterly as follows: North $31^{\circ} 09' 30''$ West, 21.0

feet, more or less, to a point opposite Station 2099/78.67; thence along a spiral curve left, said curve having a central angle of $2^{\circ} 30'$ to a point opposite Station 2097/28.67; thence along a 2714.79 foot radius curve left 930.0 feet, more or less, to the West line of the said $SW\frac{1}{4}SE\frac{1}{4}$; thence, North along the said west line 383.0 feet, more or less, to the Point of Beginning.

Highway Station reference: 2086/30 to 2101/51.1 (Eastbound Connection) and 2087/50 to 2105/88 (Future Extension).

The above description encompasses approximately 26.89 acres of which approximately .64 acres is acknowledged to be a portion of public road.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

ORDER FOR DELIVERY OF POSSESSION

This action coming on for hearing ex parte upon motion of plaintiff for an order for the surrender of possession of the property described in the complaint filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It is, this 13th day of June, 1958, adjudged that all defendants to this action and all persons in the

possession or control of the property described in the complaint filed herein shall surrender possession of the said property, to the extent of the estate being condemned, to plaintiff on or before 12:00 o'clock noon on the 30th day of June, 1958, provided that a copy of this order shall be served upon all persons in possession or control of the said property on or before July 30, 1958.

Dated this 13th day of June, 1958.

/s/ CHASE A. CLARK,
Judge, U. S. District Court.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

JUDGMENT ON DECLARATION OF TAKING

This Cause coming on to be heard at this term of court upon the motion of plaintiff, United States of America, to enter a judgment on the Declaration of Taking filed in the above-entitled cause on June 13th, 1958, and for an order fixing the date when possession of the estate or interest upon the property herein described is to be surrendered to the United States of America, and upon consideration thereof and of the Complaint filed herein, said Declaration of Taking, the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said Complaint;

Second: That a complaint in condemnation was filed at the request of the Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States of America, the authority empowered by law to acquire said estate or interest upon the lands described in said complaint and also under authority of the Attorney General of the United States;

Third: That the Complaint and Declaration of Taking state the authority under which, and the public use for which the estate of interests upon said lands were taken, that the Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States of America, is the person duly authorized and empowered by law to acquire lands such as are described in the Complaint for the purpose of adequately providing for the construction, reconstruction, and improvement of Idaho Highway Project I-3022(7), and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Fourth: That a proper description of the land upon which said estate or interest is sought to be

taken, sufficient for identification thereof, is set out in said Declaration of Taking;

Fifth: That said Declaration of Taking contains a statement of the estate or interest in the said lands taken for said public use;

Sixth: That a plat showing the lands taken is incorporated in said Declaration of Taking;

Seventh: That a statement is contained in said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for said estate or interest, in the amount of \$2,275.00, and that said sum was deposited in the registry of this court for the use of the parties entitled thereto upon and at the time of the filing of the said Declaration of Taking.

Eighth: That a statement is contained in said Declaration of Taking that the amount of the ultimate award of compensation for the taking of said estate or interest, in the opinion of the said Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States, will be within any limits prescribed by law on the price to be paid therefor; it is, therefore, this 13th day of June, 1958,

Ordered, Adjudged and Decreed that the estate or interest in the lands described in Schedule "A," attached hereto and made a part hereof, vested in the United States of America upon the filing of said Declaration of Taking and the depositing in

the Registry of this court of the said sum of \$2,275.00, as hereinabove recited, the said estate or interest in the said lands are deemed to have been condemned and taken for the use of the United States of America and the right to just compensation for the estate or interest in the property taken, upon the filing of the Declaration of Taking and making of the deposit, vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law, and

That the United States was entitled to the possession of the estate or interest upon the lands above described at 12:00 o'clock noon on the 30th day of June, 1958, and within 30 days hereafter, a certified copy of this judgment shall be served upon the defendants in possession of said premises, or if no defendants are in actual possession of said premises, then within 30 days hereafter, a certified copy of this judgment shall be posted in a conspicuous place upon the premises, the United States and its agents are hereby authorized to enter upon said premises and take full and complete possession of said estate, and this cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises; and

It Is Further Ordered that the United States Marshal be and he is hereby directed and instructed forthwith to serve a certified copy of this judgment upon any of the defendants now in possession

of the above-described premises, or if no such defendants are found in actual possession of said premises, then he is ordered to post such certified copy at a conspicuous place upon said premises and forthwith make due return of said service to this Court.

Dated this 13th day of June, 1958.

/s/ CHASE A. CLARK,

Judge, U. S. District Court.

[Schedule A attached to the foregoing is identical to Schedule A attached to the Complaint. See pages 7 to 10 of this printed record.]

No. 3454-S., Civil

Judge Clark

September 9, 1958

UNITED STATES OF AMERICA,

vs.

STEVE WINN, et al.

Comes now Perce Hall, counsel for the defendants, and moved the Court to withdraw defendant's demurrer.

Good cause appearing and the Court being fully advised, the demurrer was ordered withdrawn.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTION

Defendants submit herewith their requested jury instructions.

CLEMENS, SKILES & GREEN,
JEPPESEN & JEPPESEN,

By /s/ KARL JEPPESEN.

Instruction No. 1

The measure of damages to be awarded to the defendants Steve Winn and Edith Winn in this case is the difference in market value of their property before the taking of any of it by the State as compared to its market value after the contemplated new highway is built.

Instruction No. 2

The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property, known in law as a right of access and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.

Instruction No. 3

You are instructed that all loss or damage to the defendants occurring by the taking must be as-

sessed or determined in one proceeding. The damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of the defendant's property and from the use to which the State proposes to put the property taken.

Instruction No. 4

In determining market value of the defendant's property as of the date of the issuance of Summons in this case, and in determining market value of the property remaining after the taking, you must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the State has been taken and put to the use proposed by the plaintiff, and you should determine the difference between the value before the taking and after the taking, and your judgment should be for the defendant in the amount of that difference.

Instruction No. 5

In determining the value of defendant's property after the taking of a part of it by the State, you may consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have on the market value of the defendant's remaining property.

[Endorsed]: Filed September 25, 1958.

No. 3454-S, Civil

UNITED STATES OF AMERICA,

vs.

29.27 ACRES OF LAND, et al., (Tract No. 5).

September 24, 1958

Judge Clark

This cause came on for trial before the Court and a jury, R. M. Whittier, Assistant United States Attorney, appearing for the United States.

On motion of Dale Clemons, it was ordered that Dale Clemons and Karl Jeppesen be entered as counsel for the defendants, Steve and Edith Winn.

It was further ordered that the motion to intervene by Orville O. Mabe and Edna Mabe be denied without prejudice.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mrs. Margaret Watkins, D. G. Mitchell and Mrs. Pearl Bartholomew, whose names were so drawn, were excused for cause; C. H. Button, whose name was also drawn, was excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly

qualified and who were accepted by the parties to complete the panel of the jury, to wit:

1. Andrew Mickelson.
2. Leona W. Hann.
3. Mrs. Wilma Corn.
4. Edward C. French.
5. Vern Underdahl.
6. Earl Owen.
7. Etta Foss.
8. Harold Shertzer.
9. Ira Foster.
10. Mary Stamper.
11. Virginia Hanson.
12. Mrs. Chester L. Mink.

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of George H. Bowen and John George were drawn from the jury box, and on being sworn and examined on voir dire, were found duly qualified and were accepted by counsel for the respective parties.

The jury panel and the alternate jurors were sworn to well and truly try the cause at issue and a true verdict render.

Upon agreement of counsel for the respective parties and the Court being advised, it was ordered that the jurors, in company and in charge of the Marshal and Bailiffs, proceed to the property involved in this action to view the premises, and that the jurors refrain from talking among themselves

or with anyone on any subject connected with the trial of this cause. It was further ordered that the United States Marshal furnish the jury with transportation for the purpose of viewing the property.

Thereupon, the jurors were placed in charge of the U. S. Marshal and Bailiffs, duly sworn, to proceed to view the premises. The Court thereupon recessed this cause until 2 o'clock p.m., Wednesday, September 24, 1958.

The Marshal was directed to provide the jury with dinner at the expense of the United States.

After a statement of plaintiff's cause by its counsel, Richard Maule, Vernon C. Turner and Coite E. Cloninger were sworn and testified as witnesses and other evidence was introduced on the part of the United States, and here the plaintiff rests.

After admonishing the jury, the Court excused them to 10 o'clock a.m., Thursday, September 25, 1958, and further trial of the cause was continued to that time.

No. 3454-S, Civil

[Title of Cause.]

September 25, 1958

Judge Clark

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Emmett Newell and Steve Winn were sworn and testified as witnesses on the part of the defendant, and here the defendant rests.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate jurors and the jury panel retired in charge of bailiffs, duly sworn, to consider their verdict.

On the same day the jury returned into court, whereupon, the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

We, the Jury, find the fair market value of certain property described in the Complaint as Tract No. 5 as of June 13, 1958, the date of taking, to be the sum of \$100.00.

September 25, 1958.

IRA FOSTER,
Foreman.

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

United States District Court for the District of
Idaho, Southern Division

No. 3454

UNITED STATES OF AMERICA,

Plaintiff,

vs.

29.27 ACRES OF LAND, More or Less, in the
County of Elmore, State of Idaho; et al.,

Defendants.

JUDGMENT

(Tract No. 5)

This Cause, in respect to Tract No. 5, for a more particular description of which reference is hereby made to the Declaration of Taking filed herein, came on regularly to be heard before Honorable Chase A. Clark, presiding Judge, and it appearing to the satisfaction of the Court from the records and files herein,

I.

That on June 13, 1958, a Complaint, together with a Declaration of Taking, was filed herein; and there was deposited in the registry of the court the sum of \$100.00 as estimated compensation for the estate taken in Tract No. 5.

II.

That the estate taken is a fee simple title as defined in the Complaint and Declaration of Taking.

III.

That the Secretary of Commerce, at the request of the State of Idaho, has found and determined that it is necessary and advantageous to acquire Tract No. 5 in connection with the construction, reconstruction, and improvement of Idaho Highway Project I-3022(7), a portion of the national system of interstate and defense highways.

IV.

That, at the time of the filing of the Declaration of Taking fee simple title to Tract No. 5 was vested in Steve Winn and Edith Winn, husband and wife; that they are the only parties entitled to recover for the taking of said property except Elmore County, Idaho, which has a lien for general taxes.

V.

That a jury of twelve members was duly empanelled, viewed the land, heard all testimony relating to the issue of just compensation for the taking of Tract No. 5 as of the date the Declaration of Taking was filed herein on June 13, 1958, and returned its verdict on September 25, 1958, in the sum of \$100.00; that there was deposited by the plaintiff with the Clerk of the above Court the sum of \$100.00.

Now, Therefore, by reason of the law and the premises, It Is Ordered, Adjudged and Decreed:

VI.

That the use for which the lands or interests

therein were taken is a public use and that the taking by eminent domain is duly authorized by the Acts of Congress set forth in the Complaint filed herein.

VII.

That the fee simple title in and to Tract No. 5 vested in the United States of America upon the filing of a Declaration of Taking on June 13, 1958, free and clear of all liens or encumbrances.

VIII.

That as of June 13, 1958, the date of the Declaration of Taking was filed herein, the just compensation, including all damages sustained by reason of the taking of the property rights hereinabove described, is the sum of \$100.00.

IX.

That the clerk of this court be and he is hereby authorized, empowered and directed to pay to Steve Winn and Edith Winn, husband and wife, and Elmore County, Idaho, the sum of \$100.00 now on deposit in the registry of this court.

Jurisdiction is retained for such further orders as may be necessary and proper.

Dated this 29th day of September, 1958.

/s/ CHASE A. CLARK,

Judge, United States District
Court.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Steve Winn and Edith Winn, husband and wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on September 29, 1958.

CLEMONS, SKILES & GREEN,

By /s/ DALE CLEMONS.

JEPPESEN & JEPPESEN,

By /s/ KARL JEPPESEN.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 27, 1958.

In the United States District Court for the
District of Idaho, Southern Division

No. 3454

UNITED STATES OF AMERICA,

Plaintiff,

vs.

29.27 ACRES OF LAND, More or Less, in the
County of Elmore, State of Idaho, STEVE
WINN and EDITH WINN, Husband and
Wife, et al.,

Defendants.

TRANSCRIPT

This matter was tried before the Honorable
Chase A. Clark, Chief Judge, United States Dis-

trict Court, sitting with a jury, at Boise, Idaho, on September 24, 1958.

Appearances:

BEN PETERSON, ESQ.,
United States Attorney;
R. M. WHITTIER, ESQ.,
Assistant United States Attorney,
Boise, Idaho,
Attorneys for Plaintiff.

KARL JEPPESEN, ESQ.,
Boise, Idaho;
DALE CLEMONS, ESQ.,
Boise, Idaho,
Attorneys for Defendants.

September 24, 1958—10 A.M.

RICHARD A. MAULE
called as a witness by the Plaintiff, after being first
duly sworn, testifies as follows:

Direct Examination

By Mr. Whittier:

Q. Will you state your full name please?

A. Richard Albert Maule.

Q. Will you spell your last name for the Reporter?
A. M-a-u-l-e.

Q. Where do you reside?

A. Just outside of Boise, Idaho.

Q. What is your profession?

(Testimony of Richard A. Maule.)

A. Civil Engineer.

Q. Who are you employed by?

A. The Idaho Department of Highways.

Q. Is that at Boise, Idaho?

A. The headquarters is, yes, sir, and I am employed just outside of Boise.

Q. How long have you been so employed?

A. Approximately two years.

Q. Do you have any professional degrees?

A. Yes, sir, I do.

Q. What degrees do you have? [3*]

A. Bachelor in Business Administration and Bachelor of Science in Civil Engineering.

Q. Have you had any experience as an engineer?

A. Yes, sir.

Mr. Jeppesen: We will admit his qualifications as an Engineer.

Q. Handing you what has been marked for identification purposes as Plaintiff's Exhibit 1 I will ask you to state what that is?

A. That is a strip map of this Cleft Sebree project.

Q. Would you identify that—Cleft Sebree?

A. I believe Cleft is the name of the railroad station or water tower or something of the sort in what we would call the beginning of this project. We station usually from east to west, and Sebree, I believe, is another point on the railroad further toward Mountain Home. The job extends a little further than that—what I am getting at is that the

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Richard A. Maule.)

highway more or less parallels the railroad and that is probably the reason for that identification.

Q. Will you identify this insofar as its location from Mountain Home, Idaho, is concerned?

A. The entire job? [4]

Q. Yes.

A. It would be about three miles from the Sebree end of the job.

Q. To Mountain Home?

A. Approximately, yes.

Q. Mountain Home would be what direction from the Job? A. It would be southeast.

Q. Is there located on the exhibit a tract of land owned by the Defendant Steve Winn and his wife? A. Yes, there is.

Q. How is that noted on there?

A. How is it noted?

Q. Yes.

A. It is in color, the bounds of it are in color, drawn in pencil and it says "entire tract containing parcel number 5."

Q. Is there noted thereon the proposed location of the highway together with the intersections on this proposed highway as they are planned by the Highway Department? A. Yes, there is.

Q. Are they labeled thereon?

A. Yes, that's correct. [5]

Q. Is there shown thereon the location of the highway as it now exists? A. Yes.

Q. Over this area? A. Yes.

Q. And there is shown also the proposed new highway, is that correct?

(Testimony of Richard A. Maule.)

A. That is correct.

Mr. Jeppesen: I wonder if I could see the map.

Mr. Whittier: I am about to move for the admission of the exhibit.

The Court: Yes, it may be admitted and it will be placed on the board.

Q. Would you show on the map where the Winn property is located?

A. These four straight lines.

Q. Are you familiar with the land to be taken on this Winn property? A. Yes, sir.

Q. And what amount of this property is to be taken? A. 2.30 acres.

Q. For the purposes of the record would you note thereon [6] which property is to be taken?

A. That is a little hard to tell on this scale but a little triangular part of this property comes up into the Interstate proposed right of way.

Q. Will you mark that with an X?

A. Yes.

Q. At that point could you tell the jury what the design of the proposed highway will be?

A. The proposed highway is to carry a total of four lanes, two lanes east bound and two lanes west bound, they are to be separate roadways. The center lines are a hundred feet apart. The center line of the east bound is fifty feet on one side of the main center line—a theoretical center line, and the center line of the west bound is fifty feet on the other side. To my recollection approximately, oh, between 90 and a hundred and some feet, I think 120 feet on

(Testimony of Richard A. Maule.)

this side (indicating) and the same amount on the other side is required to be taken. It is no different, I would say, than any other highway except that it is a pair of highways, a pair of highways adjacent to each other.

Q. And the corner that is taken of the Winn property is an entire corner, there is no division of one part of his property from another? [7]

A. No, sir.

Mr. Whittier: I think that's all, you may examine.

Cross-Examination

By Mr. Jeppesen:

Q. Mr. Maule, what is there—how much frontage of the new highway is on the Winn property?

A. How much is exposed?

Q. What frontage does he have on the new highway?

A. 650 feet.

Q. 650 feet of the Winn property is exposed to the new highway?

A. That's correct, exposed to the new highway.

Q. Will there be access to the new highway from that 650 feet?

A. No.

Q. Why not?

A. My understanding was that the highway would be designed with no access at any point except as indicated in a brochure—

Q. Do you mean it would be impossible for any person, including this defendant here to enter the

(Testimony of Richard A. Maule.)

highway at any point along these strips shown there?

A. The way the highway is presently designed, this section of the Interstate, it would be impossible to enter any portion of the Interstate Highway between these [8] two points (indicating) in this vicinity.

Q. Will that be fenced? A. Yes, sir.

Q. Where is the nearest point that Mr. Winn could get on the highway from his present location?

A. I believe that it would be approximately 4.8 miles from his property to this Sebree Connection and that would be the nearest point.

Q. He would have to travel 4.8 miles to get on this road? A. That is approximate.

Q. Now, on the direction toward Boise how far would he have to go to get on that same road?

A. I am not too familiar with this, off the Interstate, however he would have to travel about 2.3 miles to this underpass, this is the structure that is lying off here (indicating), over the Interstate but will not give them access to it, and it would be, by scale, approximately when this present job is completed it would be approximately a little over eight miles to the crossing over here and in the vicinity of a little over fourteen around this way if you follow this road parallel with the railroad track——

Q. You said eight or fourteen?

A. This route up here would be approximately a little over fourteen.

Q. That is, he would have to travel fourteen

(Testimony of Richard A. Maule.)

miles toward Boise if he wanted to get on the new road, from his place?

A. That is if he stayed on this side of the Interstate. He could cross over this underpass but he couldn't get on the Interstate at that point—it would be approximately eight miles.

Q. Would it be eight miles if he went on the underpass to a point where he could get on the freeway?

A. This would be the closest point he could get on the Freeway. I presume he could find a road across the desert.

Q. In other words, it is eight miles to that underpass?

A. It is approximately 2.3 miles from this point here (indicating) to the underpass and then it is about six miles up this road and over to highway 30 on the nearest road that could be considered a road of any reasonable use.

Q. This is about eight miles that people who wanted to visit him would have to go to get on a traveled road toward Boise, and the other way they would have to go 4.8 miles to get to his place?

A. That's correct. [10]

Q. Now, what happens to Highway 30 as it now stands on the west of Mr. Winn's Property?

A. Highway 30 is planned to be continued along to this point (indicating) and slightly beyond, it intersects this road here you see which runs to the railroad track in the direction of Boise, and comes

(Testimony of Richard A. Maule.)

down this way. From this point back this way it is planned to obliterate the road.

Q. You will tear up the culverts?

A. That's correct, to the best of my knowledge the road will not be usable.

Q. And at the point where the Interstate intersects the road extending to the south is that a paved improved road?

A. This road here (indicating)?

Q. Yes.

A. I don't know the condition of that road.

Q. Is it not just a dirt road that takes off across the desert?

A. I am not certain as to the condition of that—I believe it's usable.

Q. As a matter of fact highway thirty as it is at the present time—the present Highway 30 will no longer be useable for travel to and from Mr. Winn's property, after [11] this new route is built?

A. That is correct. I understand there would be no road from this point by way of present highway thirty, as such.

Q. On the other end, in here—it will be open for approximately 4.8 miles and then it goes, I suppose, in a clover leaf?

A. It is proposed to ultimately place a clover leaf here, however, it will connect or rather intersect a connection coming off the Interstate and coming back on to highway thirty, that would leave an access at that point (indicating).

Q. Is there any consideration given in the pres-

(Testimony of Richard A. Maule.)

ent plans to supplying a paved or improved road to Mr. Winn's present place?

Mr. Whittier: You mean any other location in addition to this?

Q. Yes, any other means of getting to his place except what you have told me here?

A. No other.

Q. Is the proposed route a part of the same highway system as highway thirty now is—is it still considered a part of Highway 30?

A. I couldn't answer that. [12]

Q. It does use stretches of Highway 30 and then departs from it?

A. Physically speaking, yes.

Mr. Jeppesen: I think that's all.

Redirect Examination

By Mr. Whittier:

Q. Mr. Maule, in so far as the road through or to this property is concerned is it changed at all?

A. Physically.

Q. As the road now exists through the property?

A. I don't know the answer to that, as it now exists.

Q. Would the location be changed?

A. No.

Q. Would the access be controlled in any way off Highway 30 to the Winn property as it now exists?

A. To the best of my knowledge it would remain the same.

(Testimony of Richard A. Maule.)

Q. There is no plan to deprive Mr. Winn of the use of highway thirty to his property, as it now exists? A. No—that is correct.

Q. And it is a hard surfaced highway at that point? A. Yes, that is correct.

Mr. Whittier: That is all.

Recross Examination

By Mr. Jeppesen. [13]

Q. Isn't it true that, as you said, you were planning on tearing up the highway, obliterating it from this point (indicating) approximately eight miles from his property?

A. In answer to Mr. Whittier's question I said we didn't plan—his question was that we didn't plan to change the highway through the property, and my answer was no—however, this point down here on through to where it intersects the Interstate is to be obliterated.

Q. All you were referring to in answer to Mr. Whittier was the stretch within the confines of Mr. Winn's property?

A. That's correct, we won't touch that.

Q. But his access on highway 30 is materially changed?

Mr. Whittier: I object to that as repetition.

The Court: Well, if he has answered it he can answer it again.

A. Would you repeat that question?

Mr. Jeppesen: Will you read it Mr. Vaughan?

(Testimony of Richard A. Maule.)

(Question read by Reporter.)

Q. Let me put it this way: In other words, Mr. Maule, at the present time people traveling to and from Mr. [14] Winn's property can go directly from Boise and in to Boise on an improved highway?

A. Yes, that's right.

Q. And that will not be so when the new highway is built, is that right?

A. Directly into Boise on an improved highway, that is correct, they will not be able to do that.

Mr. Jeppesen: That is all.

Mr. Whittier: That's all, and now, your Honor, I have here Plaintiff's proposed Exhibit 2 which is an exemplified copy of a letter from G. Bryce Bennett, addressed to the Highway Administrator, Department of Commerce, wherein the State of Idaho requests the Federal Government to condemn this property and we move its admission. Mr. Bennett is the Highway Engineer.

The Court: It may be admitted.

VERNON C. TURNER

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whittier:

Q. State your name please. [15]

A. Vernon C. Turner.

(Testimony of Vernon C. Turner.)

Q. What is your profession sir?

A. Fee Appraiser.

Q. Where do you reside?

A. I reside here in Boise.

Q. How long have you been acting as an appraiser?

A. I have been active as a full time appraiser for approximately five years, and prior to that on a part-time basis.

Q. Have you had any special training in regard to making appraisals?

A. I have had appraisal course one, sponsored by the American Institute of Real Estate Appraisers at Stanford University and Appraisal Courts two by the same sponsor at the University of Oregon and three special condemnation conferences held in Tacoma, Vancouver and Portland, Oregon, within the past four years.

Q. During the time you have been doing this appraising what types of property have you appraised?

A. Well, I appraise all types of property. However, I specialize in condemnation matters and single family and multi-family residential properties.

Q. Have you appraised farm areas and grazing areas?

A. Yes.

Q. Mr. Turner, have you been employed by the State of Idaho [16] Department of Highways to appraise certain property belonging to Steve Winn and his wife?

A. Yes, sir.

(Testimony of Vernon C. Turner.)

Q. Did you make the appraisal?

A. Yes, I did.

Q. Have you any interest in the property directly or indirectly or do you contemplate any interest in the property in the future?

A. None whatsoever.

Q. Are you related to any of the parties interested in this suit? A. No, sir.

Q. Mr. Turner, in making your appraisals you have been asked to determine at times the market values, have you not? A. Yes.

Q. Define, as an expert appraiser, what your definition of market value is?

A. Market value is that price measured in terms of money which a willing buyer not compelled to buy and a willing seller, not compelled to sell can agree upon, both being fully aware of its capabilities and adaptabilities.

Q. Now, while you were making your appraisal of the Winn property did you take certain photographs of this area? [17]

A. Yes. I might add on those photographs that they were taken in conjunction with Mr. Peterson, another appraiser.

Q. Handing you what has been marked for identification as proposed Exhibit 3 will you state what it is? A. Pardon?

Q. Will you state what proposed Exhibit 3 is?

A. One photo is a print of station 1846 looking south toward the Rock Shop, that is the improvements on subject property and the Crater Station.

(Testimony of Vernon C. Turner.)

The second photo is a closeup of the rock shop looking west and the third photo——

Q. That is Exhibit 4?

A. Exhibit 4, yes. This shot was taken between the Rock Shop and the Crater Station both being the improvements on subject property at station number 1846 which is directly under the point of the arrow in this particular photo, and print number four and exhibit 4 is taken from the North side of Highway 30 looking south toward the Crater Station with the Rock Shop on the left, seen under the same arrow indicating sign.

Mr. Whittier: We move for the admission of Exhibits 3 and 4.

Mr. Clemons: We have no objection. [18]

The Court: They may be admitted.

Q. Now, you say that you have visited this land belonging to Mr. and Mrs. Winn, have you not?

A. Yes, I visited this while making this appraisal various times during the fifteen day period prior to December 12, 1957.

Q. You have examined the type of land and the nature and character of the land have you not?

A. Yes.

Q. What is your determination—have you made a determination as to the highest and best use to which this land can be put, that the Government seeks to condemn?

A. It was my opinion that the highest and best use of the subject property was as it is now being

(Testimony of Vernon C. Turner.)

utilized, namely dry land grazing, possibly held for speculative purposes due to the Mountain Home Irrigation District.

Q. During the time you made the appraisal did you have an opportunity to check like sales of comparable property in that area?

A. Yes, sir.

Q. What did you find in checking that—how many did you find?

A. I found six recent sales of similar properties and two current listings for sale of similar properties. [19]

Q. Having in mind the definition of fair market value as the amount of cash or its equivalent that a person willing to buy but not required to, would pay, and a person willing to sell but not required to, would accept, considering the highest and best use to which this tract could have been put on the date of the filing of this action which I believe was June 13, 1958, or within a reasonable time after that. Do you have an opinion as to the reasonable market value of this tract?

A. The “before” market value?

Q. Yes, before? A. \$3,150.00.

Q. Of the tract that was taken?

A. Oh, of the tract that was taken—\$100.00.

Q. Now, you stated Three thousand some dollars, what particular tract did that refer to? You may step to the map if you desire?

A. It refers to all this land (indicating) with the exception of thirteen or fourteen acres right

(Testimony of Vernon C. Turner.)

here (indicating) where the improvements are now located.

Q. That would be everything north of the present highway—of the Winn property north of the highway? A. Yes, sir. [20]

Q. And that was the value before the taking or after taking?

A. \$3,150.00 was the value before taking.

Q. And what was the value of that particular tract after taking? A. \$3,050.00.

Q. Making the total amount of damages amount to what?

A. The difference in the value or the just compensation of \$100.00.

Q. You determined the value of this land on an acreage basis did you? A. Yes.

Q. What did you determine the value to be per acre?

A. From similar sales and listing, a valuation of fifty dollars per acre.

Q. On this tract north of the present highway 30 is there any improvements located on this land at all? A. No improvements, no.

Q. It is all land which would be suitable only for grazing?

A. For dry land grazing purposes, yes.

Mr. Whittier: That is all Mr. Turner.

(Testimony of Vernon C. Turner.)

Cross-Examination

By Mr. Jeppesen:

Q. Mr. Turner, isn't it true that north of the present highway some of the signs that you show on exhibits are located?

A. I believe that the arrow sign is located north of the [21] present highway, yes.

Q. Then did I understand that your value of \$3,150.00 was for all land both north and south of the present highway except where the improvements are?

A. Well, the previous testimony I gave was the lands north of the present highway but on looking at my sketch there is approximately twenty acres located between the present highway and the Union Pacific Railroad right of way which the \$3,150.00 would include, both the land located between the present highway and the railroad and those lands located north of the present highway.

Q. You are treating that tract of Mr. Winn's as a unit both north of that highway and south of the highway?

A. With the exception of the fourteen acres where the improvements are now located.

Q. Now, with reference to the improvements as they are shown on your exhibit and as you saw them out there, what is your opinion as to the value of the improvements on that fourteen acres as of June 13, 1958?

(Testimony of Vernon C. Turner.)

A. Will you state that again please?

Mr. Whittier: I will object to that as being immaterial.

Mr. Jeppesen: I will withdraw that. [22]

Q. Did you make an appraisal of what you refer to as the Rock Shop and the other buildings used in connection with it?

Mr. Whittier: We object to that as immaterial, it is not the same tract.

The Court: As I understand the issues here, this is a separate tract of land from that and I can see no purpose in asking this question, but I will let him answer it.

A. On a preliminary survey of the whole parcel I looked at the improvements but for the purposes of this appraisal I did not appraise them.

Q. Did you make any appraisal of them whether it was for this purpose or any other purpose?

A. No, I felt that they weren't in this.

Q. Now, you have included in your appraisal land on both sides of that fourteen acres, can you explain why you cut out the fourteen acres?

A. It was my feeling that through the unity of use rule the fourteen acres where the improvements are located had no bearing on the other land which are designated as dry grazing and not dependent upon each other.

Q. So that your appraisal of the land entirely ignored [23] the value of the improvements and other property except the dry grazing land?

(Testimony of Vernon C. Turner.)

A. I considered them. However, I did not appraise them by reason of the unity of use.

Q. You say you considered them, are they reflected in your valuation? A. They are not.

Q. You say you did make a preliminary appraisal of the property? A. Yes.

Q. What did that show as to value?

A. Well, the first duty of an appraiser is to look at the whole and in this case determine whether one is dependent upon the other. I looked at the properties, the improvements, yes, and I even know their dimensions but from an appraisal standpoint with the unity of use rule I disregarded them for the appraisal purpose of this action.

Q. In other words, your instructions were to disregard them, is that right?

A. I don't know whether my instructions were to disregard them or not.

Q. Well, let me ask you, Mr. Turner—you say you looked at the improvements and even know the dimensions of them, what they are made of and so on, would you [24] tell us what the fair market value is of the improvements on that fourteen acres you have referred to? I mean as of June 13, 1958?

Mr. Whittier: To which we object as being immaterial.

The Court: I think it is immaterial but I will let him answer.

A. I didn't make a bona fide appraisal of the improvements inside the fourteen acres.

Q. No, I realize that, but you have qualified your-

(Testimony of Vernon C. Turner.)

self here as an expert on real estate appraisals and I am asking you now, after viewing the property and knowing its size and so on, I am asking what is your opinion?

Mr. Whittier: I wish to interpose the objection that there is no proper foundation for this question. He stated that he didn't have sufficient information to make an appraisal.

Mr. Jeppesen: He has qualified as an expert appraiser and he said he is familiar with the improvements even knows their dimensions.

A. I did say that, but I also said that only in the preliminary survey did I look at the buildings to determine whether they should be or should not be included in the whole parcel and I determined that they should [25] not be included in the whole parcel so consequently I have no idea what they are worth.

Q. Do you have any opinion as an expert as to what their value is?

A. Since I didn't consider them, sir, my opinion would be valueless.

Q. Why did you, when you eliminated this fourteen acres, why did you do that, instead of two or three acres around the buildings?

A. I believe there is 12 point some odd acres, 12.67 acres which is under a contract for sale and when I say fourteen acres that's a round figure assuming that the difference between the fourteen and the 12.67 would be the adequate ground that the other improvements owned by Mr. Winn do set upon.

(Testimony of Vernon C. Turner.)

Q. Now, Mr. Turner, you say you have been appraising for five years and have been employed in all types of appraisal work. Taking into consideration the use to which all of the property of Mr. Winn's is put, that is, most of it to grazing but approximately fourteen acres as a rock shop and on a contract of sale for a service station. In your opinion is the fair market value of all of that property going to be affected by the construction of this highway? [26]

A. Not all of the property, because in making my appraisal as I have previously stated——

Q. I heard that but will you just answer my question?

The Court: He was answering your question.

A. As I previously stated only approximately 63 acres would be affected by the proposed improvement.

Q. All right, you say then that in your opinion the improved part of this property will not be affected by the making of this improvement?

Mr. Whittier: To which we object as being immaterial. He has stated that it was based upon the principle of unity of use, which is one of the elements considered in these particular suits.

Mr. Jeppesen: If your Honor please, I think that also is a question for the jury, what constitutes unity of use. Obviously he has singled out a piece of property, it is not cut off by any natural barrier, fence or road or anything else. He is singling out one little tract from this entire piece of property?

(Testimony of Vernon C. Turner.)

Mr. Whittier: If the Court please, I don't think this witness has testified to anything such as [27] that.

The Court: Knowing the situation here as I do, about all this testimony is good for is to confuse a person. These are two tracts of land and I will instruct the jury later and they will follow my instructions. I will let him answer if he can. I don't know how he can answer it if he didn't take that other into consideration.

A. Having not considered the other land, Mr. Jeppesen, I cannot give you an answer.

Q. Did you consider, Mr. Turner, in making your appraisal, did you consider the highest and best use of the entire tract belonging to Mr. Winn?

A. I previously said no.

Q. And if you were buying—I think you stated that the rule that you followed was what a willing buyer, not forced to buy would offer to pay, and what a willing seller, not forced to sell would ask for his property. Now, using that rule, Mr. Turner, would you be willing to give Mr. Winn, the defendant here just as much for his entire property out there after this highway is built as you would now, or if you knew that it wasn't going to be built?

Mr. Whittier: I want to interpose the objection that this is immaterial if this—— [28]

The Court: —yes, it isn't a question of what he would be willing to do—he might not want any of the property under any conditions.

(Testimony of Vernon C. Turner.)

Mr. Jeppesen: Yes, I think that's true. I will withdraw the question.

Q. Mr. Turner, in your opinion, what is a fair market value of the entire tract, all of the property belonging to Mr. Winn, before this Road—or rather before the property was taken.

Mr. Whittier: We wish to object to that as immaterial as to that portion of the land not involved here.

Mr. Jeppesen: I will withdraw that question and ask another.

Q. What is your opinion as to the fair market value, Mr. Turner, or the difference in market value, let's put it that way, what is your opinion of the difference in market value of Mr. Winn's entire tract of property out there, after the taking of the property, and bearing in mind the use to which it is going to be put—the manner of the use?

Mr. Whittier: We wish to object to that as immaterial, that is, as to the portion of the land [29] not involved.

The Court: He has already said that he hasn't taken that into consideration at all. I think you are asking him the same question over and over, however, I will let him answer.

A. As previously stated, by the unit of use rule I didn't take it into consideration and frankly I have no idea.

Q. So actually your figures are based without taking into consideration the use to which part of

(Testimony of Vernon C. Turner.)

the property is put and the highest and best use to which it can be put?

A. As I previously stated I excluded fourteen acres and the highest and best use was on the balance of the land.

Q. Certainly, Mr. Turner, you wouldn't, as a real estate appraiser say that his property was worth only a hundred dollars less now that they are taking that property and excluding its access to the new road—you wouldn't say that it is worth only a hundred dollars less than it was before, would you?

A. By my previous testimony of the unit of use rule I said a hundred dollars?

Q. I am not asking that. I am asking what is your opinion as an appraiser right now?

A. Mr. Jeppesen, as a professional appraiser I can see it no other way. [30]

Q. I am merely asking you——

A. ——I don't have an opinion myself personally, for me to go out there to buy it, I wouldn't have any part of it.

Q. I am not asking what anyone told you to do, I am asking only—you qualified here as an expert and I am simply asking you, do you say that his entire tract is worth, after the taking, within a hundred dollars of what it was before?

Mr. Whittier: I wish to object, he has said time and time again that he doesn't have any opinion as to the entire tract.

The Court: Yes, he has said a hundred dollars,

(Testimony of Vernon C. Turner.)

but maybe he will change his mind, he may answer, go ahead.

A. Well, I am sorry, I don't know whether you want my so called professional opinion or my personal opinion or what you are looking for. I have given you all the answers that I have.

Q. I want your opinion as an appraiser now, let's forget who you are employed by——

The Court: ——Mr. Jeppesen, just ask your questions, don't argue with the witness.

Q. Mr. Turner, what I want to know is, what is your own opinion as an expert appraiser of real property, as to whether or not this entire tract is worth only a hundred dollars [31] less by reason of the taking and the exclusion of access than it was before the taking?

A. I previously stated, yes, one hundred dollars.

Q. You feel that, taking into consideration the loss of access to the property, that he can't get on that road without going clear to Mountain Home——

A. ——Mr. Jeppesen, by the rules by which an appraiser is governed there are certain things that you take into consideration and there are certain things that you do not take into consideration, until such time that I am instructed that circuitous travel is compensable I cannot consider it.

The Court: This is a very simple matter to clear up—not taking into consideration any highway construction there or anything of that nature, and taking the whole property, what would you say the value of the property was lessened by the taking of

this small tract of land, and you have already answered that as a hundred dollars. I don't see that there is anything more for him to answer.

Mr. Jeppesen: That's all.

The Court: We will take a recess for fifteen minutes.

(Admonition to the jury.)

3:19 P.M., September 24, 1958 [32]

COITE E. CLONINGER

called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Whittier:

Q. Your name is Coite Cloninger?

A. Yes, sir.

Q. You are a Deputy United States Marshal?

A. Yes, sir.

Q. You were told on this date, by the Court, to take the jury to certain lands belonging to Mr. and Mrs. Winn in an area just west of Mountain Home, is that right?

A. That's right.

Q. Will you show on the map what area was shown to the jury, if you can?

A. First we went to the area known as the Crater Station, a service station there, and between the service station and the Rock House, we pointed out that property, and then we left there and came toward Boise a short distance maybe less than a quarter of a mile and turned off on an old road off

(Testimony of Coite E. Cloninger.)

through the sagebrush to where the property was marked off by means of flags and we pointed out to the jury these flags and this property involved. [33]

Q. You have heard the testimony given here, have you not? A. Yes.

Q. Did you determine that it was the same area that was referred to by the appraisers?

A. Yes.

Q. And that was shown to the jury?

A. Yes.

Mr. Whittier: That is all.

Mr. Clemons: No questions.

Mr. Whittier: The Plaintiff rests, your Honor.

Mr. Jeppesen: We would like to make a short statement to the jury at this time and then have a recess until morning if we may, we just got into the case and we would like to have a recess at this time.

The Court: That will be satisfactory to the Court.

Mr. Whittier: We have no objection to that.

(Opening statement by Mr. Jeppesen.)

The Court: We will recess at this time until 10 o'clock tomorrow morning. [34]

EMETT NEWELL

called as a witness by the Defendants, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Jeppesen:

Q. Will you state your name?

A. Emmett Newell.

Q. Where do you reside?

A. 1107 Liberty Road, Boise.

Q. What is your profession Mr. Newell?

A. I am a real estate dealer and appraiser.

Q. Will you tell us how long you have been active as a real estate dealer and appraiser?

A. About four years.

Q. Prior to that time had you had any experience with real estate?

A. Well, I had owned and operated a ranch—quite a good sized ranch and I had bought and sold real estate, quite a considerable amount of real estate.

Q. Have you made any appraisals prior to the present one?

A. Yes.

Q. For what Companies or individuals?

A. I appraised for the Prudential Insurance Company. I have [35] done quite a bit of appraising for different individuals for several different reasons, and of course, during my real estate business I appraise all the time for purchase and sale.

Q. Have you had any formal training for appraisal work?

(Testimony of Emmett Newel.)

A. Yes, I went to the University of Oregon and took the Appraisal One course put on by the American Institute of Real Estate Appraisers, and I took an appraisal seminar put on by Jeff Holbrook and Ralph Alstrom of Portland.

Q. Was that at Boise Junior College?

A. At Boise Junior College, yes.

Q. Are you familiar with the property in question here, the property of Mr. and Mrs. Winn?

A. Yes, I am.

Q. Have you been on the property and made an examination of it, Mr. Newel?

A. Yes, I have.

Q. What is the highest and best use of the Winn property? A. As it is being used at present.

Q. And what is the present use?

A. Well, the present use is for the Commercial frontage there for the Rock Shop and the Highway frontage possibly for future development. [36]

Q. The frontage you refer to is that both sides of the highway? A. Yes.

Q. Do you have an opinion as to the market value of the Winn Property?

Mr. Whittier: May I ask a question in aid of an objection?

The Court: Yes, you may.

Q. (By Mr. Whittier): Now, is the opinion that you are about to give as to the land taken or as to the property as a whole?

A. I don't know what he is going to ask me yet.

Mr. Whittier: Nothing further at present.

(Testimony of Emmett Newel.)

Q. The question Mr. Newel, is as to the market value of the Winn Property as it was just prior to June 13, 1958?

Mr. Whittier: I wish to object to that question on the ground that it covers issues far beyond the scope of this trial.

Mr. Jeppesen: If your Honor please, I think it is the well accepted rule that in condemnation cases, to fix severance value, it is proper to inquire as to the before and after value of the property. It is on that basis we ask this question.

The Court: So as to make this [37] clear to you I will say that the amount of damage that will be allowed will be the value of this tract of land that is being taken without regard to the fact that the freeway is being built. In other words, the Court cannot allow you any damages because the road is being built farther away from the defendant's property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he has sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the Government to build an access road from the highway to his property. So the only thing I can submit to this jury is the value of this tract of land cut off from this place, what dam-

(Testimony of Emmett Newel.)

age it does to the place, this small tract from the outside corner. I think I have made that clear.

Mr. Jeppesen: I would like to go on for the record on this basis.

The Court: I don't like to have [38] the jury confused and this evidence will not be any help to the jury in arriving at its verdict. However, if you want to put it in the record you may do so.

Mr. Jeppesen: Your Honor, I would like to have the record show by this witness, the value before and the value after.

The Court: I think the best practice would be for me to excuse the jury and in order that you may make up your record, you may, in the absence of the jury, state what you propose to prove.

(Jury excused and the following proceedings had without a jury.)

The Court: Now, go ahead, you know what the evidence is which you desire to have in the record and you may make a statement of what you propose to prove by this witness.

Mr. Jeppesen: Your Honor, we will offer to prove by this witness if permitted to testify—let me put it this way: This witness Mr. Emmett Newel, if permitted, would testify that the defendant Winn had approximately 67 acres of land in one contiguous tract divided only by the present highway which runs through the property. There are no fences on either side of the highway except the fence around one building. That the [39] total value of the property as of the date immediately preceding the tak-

(Testimony of Emmett Newel.)

ing on June 13, 1958, was the sum \$11,380.00, and the witness will also testify that the land has a principal value as commercial property and a small use for grazing but that it has a potential on both sides of the highway as commercial property. That after the taking, the property as commercial property is valueless, that it has some value as grazing and also future farm land if something develops out there, which is speculative, so that the value after taking, of the entire tract is \$2,400.00 and that the difference between the two values before and after is \$8,980.00.

The Court: And it will be based upon the further reason that the gas station and the other business there doesn't have access to the highway.

Mr. Jeppesen: The gas station is not included in this your Honor.

The Court: I mean the other business does not have access to the highway.

Mr. Jeppesen: It is not cut off entirely your Honor. I think he can continue to Mountain Home by going on, continuing I think the witness testifies 4.10 miles or some such distance.

The Court: His opinion would be based [40] upon——

Mr. Jeppesen: ——it is a sort of *cul de sac*.

The Court: But his opinion would be based upon the fact that the new highway is to be constructed some distance from his place and that he didn't have access to the new highway?

Mr. Jeppesen: No proper access.

Mr. Clemons: It is also based upon his loss of the

(Testimony of Emmett Newel.)

present access, and the element that he will take into consideration will be the loss of access.

The Court: It would have to be based on the highway that is proposed to be built—that it does not provide an access road to his place of business.

Mr. Clemons: That's true.

The Court: But there is no duty on the part of the Government to provide any access road for this property, you may make your record in conformity with the ruling.

(The following proceedings had in the presence of the jury:)

The Court: You may proceed Mr. Jeppesen, in conformity with the Court's ruling.

Q. Mr. Newell, do you have an opinion as to the market value of Mr. Winn's entire tract of land as of just prior to the taking on June 13, 1958?

A. Yes.

Q. And will you——

Mr. Whittier: ——Just a moment, please. We object to the question as being immaterial to the portion of the land lying south of the present highway.

The Court: I can see the reason for the objection, however, I will let him answer. What you are leading up to is contrary to the Court's ruling but I will let him answer.

A. I valued his entire holdings at \$11,380.00.

Q. Now, Mr. Newel, taking into account that the taking of part of his property—strike that please,

(Testimony of Emmet Newel.)

and let me ask this. Were you present yesterday when a witness for the plaintiff explained the map up there (indicating)—are you familiar with exactly what they are doing with the highway?

A. Yes.

Q. And you are familiar with the way it is being built with no access for some distance on each side of this property?

A. Yes.

Q. Then I will ask you Mr. Newel, what is the fair market value of his property after the taking a part of it and devoting that part to the use proposed by the highway?

Mr. Whittier: We object to that as [42] being immaterial insofar as the use that the plaintiff is going to put the land to, and also insofar as it pertains to that land lying south of the present Highway 30.

The Court: Your question doesn't give the witness an opportunity to take into consideration the fact that this corner is being cut off for land for highway purposes and that there is no duty on the part of the Government to make an access road to this property, but with that added to it he may give his opinion as to what the value is before and after the taking of this particular tract of land. Do you understand the Court?

A. Yes. I value the land after the taking at \$2,400.00.

Mr. Jeppesen: That is all, you may examine.

(Testimony of Emmett Newel.)

Cross-Examination

By Mr. Whittier:

Q. Mr. Newel, in your valuation of the land, did you determine the value of the land taken on an acreage basis? A. Yes.

Q. And you were here when it was testified that they were taking 2.28 acres of the land?

A. I heard that, yes, sir.

Q. Now, what would be the value of the 2.28 acres of land [43] without any consideration given to any other particular item?

A. At the time I made my appraisal I didn't have the exact figure for that, and I figured it at approximately two acres and I valued that at \$70.00.

Q. What was the value of the land taken, in your opinion, on an acreage basis?

A. \$35.00 an acre.

Q. Then the total for the 2.28 acres would be somewhere in the neighborhood of \$85.00 would you say? A. Approximately that.

Q. What did you base the other \$7,900.00 on, what did you place that value on?

A. I appraised the buildings separately and the improvements on the property.

Q. What damage would this taking of the 2.28 acres do to the buildings?

A. To the buildings?

Q. Yes, what damage would the taking of that land do to the improvements?

A. Physically it would do none.

(Testimony of Emmet Newel.)

Q. There would be no possible damage further—let me repeat that—there would be no possible further damage to the buildings by reason of this roadway not even [44] touching Mr. Winn's property than it would be by taking the 2.28 acres.

Mr. Jeppesen: Just a minute—we are not concerned with the physical damage to the buildings—

The Court: —I don't need any argument on that, he may answer.

A. Will you state that again?

Q. If the Government had never touched Mr. Winn's property nor taken any of Mr. Winn's property but had gone to the north approximately three hundred feet so that the highway would have missed Mr. Winn's property entirely, would Mr. Winn's improvements be damaged just as much as they are under the present state of facts?

Mr. Jeppesen: We object to that as being incompetent, immaterial and irrelevant, asking for a conclusion of the witness and is speculative.

The Court: It appears to me to be a very plain question. He may answer.

A. Physically I would say the damage would be the same.

Q. What about other considerations that you have given?

A. Yes, the damage would be the same.

Q. Then your entire appraisal is based upon the access or non-access to the proposed new highway, is that correct?

(Testimony of Emmett Newel.)

A. My appraisal in the damage done him was based on his loss [45] of access.

Q. It was based on the loss of access?

A. Yes, sir.

Q. Has Mr. Winn, at the present time, any access to any road leading in the present line of the proposed new highway?

A. I don't understand.

Q. Is there any road now existing in the proposed site of the new highway?

A. Not in the proposed site, just the present highway 30.

Q. He has no access to that portion of the land at the present time?

A. He has access to that portion of the land—he owns it.

Q. That portion, as far as the exterior boundaries are concerned he has no access to that. What access do you say that he has lost?

A. That he has lost?

Q. Yes, what access has he lost, you said that you base it upon loss of access?

A. I base it upon the fact that he has lost access, or that he has a business there and I based it on the fact that at the present time Highway 30 is well traveled and a lot of people stop in. That's how he makes his living out there. After the highway is moved I would say that he will have no business whatever because no one would drive out there to trade at his place of business [46] and drive eight or nine miles.

(Testimony of Emmet Newel.)

Q. Then your opinion is based partially on loss of business is that right? A. Yes.

Mr. Whittier: We move that the opinion of this witness be stricken as being incompetent, irrelevant and immaterial and not being a proper basis upon which an award of damages can be made.

The Court: In view of the Court's ruling that there is no obligation on the part of the Government to build an access road from the new highway over to his place of business, even if it was built it would be doubtful that anybody would leave the main free-way to go over to his place of business. That is not a question here. There is no obligation on the part of the Government to build an access road from the new highway to his place of business or to permit him to move his buildings over to the new highway and give him an access to the new highway.

Mr. Jeppesen: It is not our contention that they should build him a new road or move his buildings, but it is our contention that if they destroy the access he now has, that they should pay for that. We don't contend that they should move his [47] buildings. There is no obligation to do that nor to build another road, but they should pay for what they are taking, and they are taking off the free access of the public and himself to his business.

The Court: The motion to strike will be granted, there is no proper foundation laid for it.

Mr. Whittier: No further cross-examination.

(Testimony of Emmett Newel.)

Redirect Examination

By Mr. Jeppesen:

Q. Mr. Newel, let me ask, are you familiar with the construction, that is, the proposed detail of the new highway, as to where the defendant Winn and his customers will have to get off the new highway and drive to his place of business?

A. I saw the gentleman point it out on the map there.

Q. Your testimony here, you are basing that on the fact that he would have to—he and his customers would have to travel some 4.8 miles toward Mountain Home on a road which will no longer be maintained by the State, in order to get to and from his business?

Mr. Whittier: We object on the ground that there is nothing in the evidence upon which to base such a—— [48]

The Court: ——I will let him answer that.

Q. Are you taking that into account?

A. Yes.

Q. With reference to access from the other direction, are you familiar with the condition there?

A. I saw it pointed out on the map the other day.

Q. Then the basis for your appraisal was your knowledge of the property itself based upon an examination of it and also your knowledge of the condition that will exist upon construction of the new highway?

A. Yes.

Mr. Jeppesen: We offer again, your Honor, his

(Testimony of Emmett Newel.)

answer to the question of the market value of the property.

Mr. Whittier: To which we object as being immaterial.

The Court: The objection is sustained.

Q. Mr. Newel, one other question. In your opinion, is diminution in value after the construction of the highway, due to loss of access to his place of business? A. Yes.

Mr. Jeppesen: That is all.

Mr. Whittier: No further questions. [49]

Mr. Jeppesen: For the record we again offer Mr. Newel's testimony as to value, based upon the additional answers he has given now.

The Court: In view of the objection on the part of the Government the offer will be denied.

STEVE WINN

called as a witness by the defendants, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Jeppesen:

Q. Will you state your name, please?

A. Steve Winn.

Q. And where do you reside Mr. Winn?

A. Eight miles out of Mountain Home, on Highway 30, at the Craters.

Q. Edith Winn is your wife, is she?

A. Yes, sir.

Q. Is she here today?

(Testimony of Steve Winn.)

A. No she is at home.

Q. How old are you Mr. Winn?

A. I am 64.

Q. You are the owner of the property that has been referred to on the map and in the testimony as the Winn property? A. Yes, sir. [50]

Q. How many acres does that consist of?

A. There is 67 acres.

Q. How long have you operated what has been referred to as the Rock Shop?

A. This is the fifth year.

Q. The fifth year? A. Yes, sir.

Q. Is that Rock Shop the means of your livelihood? A. I didn't get that.

Q. Is that Rock Shop the means of your livelihood? A. Yes, sir.

Q. Is that the way you make your living?

A. Yes.

Q. Now, you have heard all the testimony, yesterday, about the roads leading to and from your property? A. Yes, I did.

Q. I think there was something said about the road toward Boise that you could follow after they build the new highway. Will you tell us how you would get to Boise after this new highway is built on the line as shown on the map?

A. Well, there is two different roads he stated—the one that goes under an underpass is just a dirt road after it leaves the underpass and it wanders around plumb to the [51] mountains, back down to Mayfield and back down to the Crater station

(Testimony of Steve Winn.)

where it comes in. I would say it is approximately thirty-five miles.

Q. And it is just a dirt road?

A. It is just a dirt road and it is impassable in the wintertime.

Q. And that would be your only access if you went straight toward Boise?

A. Yes. The man, yesterday, showed another road on the map, on the other side but it's been abandoned for thirty years and it's impassable.

Q. Now, as a practical matter, to get to your place of business, people from the west, from Boise, would have to go past your place to Mountain Home, wouldn't they? A. That's right.

Q. And how far beyond your place would they get back on the old highway?

A. I think it's about four miles.

Q. Yesterday a witness testified that it was 4.8; would that be about right? A. I think so.

Q. And that would lead you to present highway thirty and over to your place? A. That's right.

Q. Now, in your opinion, Mr. Winn, what was the market value [52] of your property prior to June 13, 1958, when they filed this suit?

Mr. Whittier: Objected to as being immaterial as to the 67 acres, that part south of the present highway thirty.

Mr. Jeppesen: Your Honor, they themselves put in testimony yesterday as to the entire tract.

The Court: I will let him answer before he gives

(Testimony of Steve Winn.)

the difference in value. I will require you to conform to the Court's ruling.

A. What was the question?

Q. What is your opinion of the market value of your entire tract just prior to the taking on June 13, 1958?

A. Well, I have \$15,900.00 in actual money in the place.

Q. Invested there? A. That's right.

Q. What would you say then is the market value of the property?

A. At the present time?

Q. No, just prior to the taking?

A. Well, I figure it is worth over twenty thousand, I never did want to sell it, or offer it for sale.

Q. Now, Mr. Winn, taking into account the taking of a small part of it and the manner in which they propose to build the highway through there, past your property, what would you say the property would be worth? [53]

Mr. Whittier: Objected to as being immaterial and no foundation is laid.

The Court: Objection sustained.

Q. Let me ask you, your valuation which you placed on it is based mainly upon your business property, is that right? A. Yes, sir.

Q. In your opinion would you be able to continue that business after the highway is built and your access is destroyed?

Mr. Whittier: That is objected to as being immaterial.

(Testimony of Steve Winn.)

The Court: Objection will be sustained.

Q. In giving your opinion are you taking into consideration or account your loss of access as we have been told here? A. No; I am not.

Q. Taking into account that your access to the new route will be destroyed, or rather disrupted as you have explained to us here, what would be your opinion of the value of your property after the taking of that part by the United States, the part indicated here (indicating)?

Mr. Whittier: Objected to as immaterial, no foundation is laid and it is far beyond the scope of this trial. [54]

The Court: The objection is sustained.

Mr. Jeppesen: I would like to make an offer of proof by this witness.

The Court: You may go ahead and make your offer, I won't excuse the jury, you may make the offer in the presence of the jury.

Mr. Jeppesen: If the Court please, at this time Defendants offer to prove by this witness, and if permitted to testify, he would testify that by reason of the disruption of access, on the east, to his property—let me change that—he would testify that by reason of the disruption of access from the east, to his property and by reason of the disruption of the access from the west to and from his property that his business would be rendered valueless except for the salvage value that he might get out of the buildings, and that the property thereafter would only be valuable for grazing rights,

(Testimony of Steve Winn.)

and that its value would be approximately \$2,500.00 after the taking, and that value would be by reason of those elements.

The Court: The offer of proof will be denied, because it does not properly cover the situation.

Q. Mr. Winn, at the present time do you have any constructions of any kind on the south side of the highway?

A. On the south side of the old highway?

Q. Yes. [55] A. The present highway?

Q. Yes.

A. Yes; we have two signs over there.

Q. How much money do you have invested in those signs?

Mr. Whittier: To which we object as being incompetent, irrelevant and immaterial.

The Court: Yes; I think it is, but he may answer.

A. I think about a thousand dollars.

Mr. Jeppesen: That is all.

Cross-Examination

By Mr. Whittier:

Q. Does the Construction of the highway or the taking of the land touch any part of these signs that you spoke of? A. No.

Q. Does it damage them in any way?

A. Yes; they take my living away and leave me stranded on the desert.

(Testimony of Steve Winn.)

Q. I mean, does the taking of the land damage the signs in any way?

A. They don't damage the buildings, no.

Mr. Whittier: I move to strike the answer insofar as any damage to the signs as not being a proper item of damage to consider in this case.

The Court: It may be stricken. [56]

Mr. Whittier: That's all.

Mr. Jeppesen: That's all. The Defense rests.

The Court: Is there any rebuttal?

Mr. Whittier: Nothing further.

The Court: We will take a short recess and I will see counsel in chambers.

11:00 A.M., September 25, 1959

(Argument of counsel to Jury.)

INSTRUCTIONS OF THE COURT

Ladies and Gentlemen of the Jury:

We have now reached the point in this case where it becomes the duty of the Court to explain to you the issues in the case which you are called upon to determine by your verdict, and to instruct you as to the law and the rules by which you must be guided in your deliberations. It is your duty to accept these instructions as correct, and so far as the law in the case is concerned to be guided by the Court's instructions. The law provides an ample and adequate remedy whereby any mistakes in the

instructions may be corrected, but it is not the province of the jury to undertake to correct mistakes of law which the Court may make, and for the purposes of your deliberations the instructions which I will give you must be accepted as the law in the case. [57]

Yours is a serious duty, it involves a matter of great importance to those who are parties to this litigation. Your selection as jurors was not by chance, but was because of your reputation for good citizenry, intelligence and fairness.

You should see that these defendants receive, under these instructions which I am about to give you, fair compensation, no more, no less, for the taking of their premises. You and I are a part of the United States Government and each of us holds our place in this Government as an equal, and you, when you sit as jurors, are called to sit in judgment in this matter as a jury of the defendants' peers.

* * *

It is the duty of the Court to instruct you as to the law governing the case, and you shall take such instructions to be the law. You shall consider the instructions as a whole and not pick out any particular instruction and place any undue emphasis upon it.

You will disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the Court,

and any evidence which after the admission was stricken by the Court.

The statements of the attorneys in the case, [58] made at the beginning of the trial and in their arguments, are not evidence and should not be considered by you as such.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received in this trial and your view of the premises.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

* * *

You have a right to consider the interest of any witness or witnesses in the outcome of the case in giving credence to the testimony of such witness or witnesses. You will consider his opportunity of knowing or becoming acquainted with the situation surrounding the matters about which they testify, you may consider their frankness or lack of frankness and from all these things you will say what weight the evidence is entitled to receive.

* * *

The Government comes into Court just as a [59] private individual or a private corporation would

come if such individual or corporation were in need of the land here involved.

In other words, the Government comes here as a litigant or a petitioner, submitting itself to the jurisdiction of the Court, and asks the Court, and that includes the jury, to say what it should pay for the land involved here.

* * *

The fact that the relocation of the Interstate Highway may deprive the defendant here of profits incidental to his business is not an element of damages. The Government in the exercise of its lawful Governmental powers retains power to relocate highways within the State.

* * *

The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property, known in law as a right of access, and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.

This instruction does not apply to the new highway, but just to the old highway. [60]

* * *

Testimony as to the market value has been given in this case by opinion witnesses, or expert wit-

nesses. The opinion of such witness is admitted in evidence in cases where the value of property, such as owned by the defendants in this case, and involved here, is in issue. An opinion witness is one who testifies that he has sufficient knowledge concerning the matter, acquired by study, training, and observation or experience, to permit him to give his opinion. Where the testimony of such witness is as to anything that can be observed and seen by any other witness, his testimony is to be viewed as that of any other witness, giving consideration to any particular training and experience he may have as to any bearing it may have upon any increased accuracy on his part over that of a person of ordinary experience. Insofar as his testimony is an expression of opinion based upon facts in the case shown by the evidence, you must, before considering the weight of the opinion of such witness, first find from the evidence that the facts upon which his opinion is based, are true. You are not bound by any opinion testimony, and it should be considered by you in connection with all the other evidence and should be given such weight as you believe it is entitled to receive.

* * *

Your view of the property was made with the thought in mind that you would be better able to follow the [61] testimony as given from the witness stand. You have a right to consider your view in arriving at a verdict in this matter, and you should

consider it together with all other evidence submitted.

* * *

It is necessary that the claim or claims of any party to a suit of this kind be proven by a preponderance of the evidence, and, of course, this is for you to decide in arriving at what you consider fair compensation in this matter.

* * *

By preponderance of evidence I do not necessarily mean the greater number of witnesses on a material point, but rather the weight of the evidence. That is, that evidence which when fairly, fully and impartially considered by the jury produces the stronger impression, and has the greater weight and is more convincing as to its truth or correctness when contrasted or weighed against the evidence in opposition thereto.

* * *

Under the Constitution of the United States it is provided that property will not be taken for public use except upon payment of just compensation. You will note that the thing the private owner is entitled to when [62] their property is taken for public use is "just compensation." The Government of the United States possesses what is known in law as the "power of eminent domain," which means that in the exercise of its legitimate powers it has the right to take private property whenever

such property is necessary for public use and convenience. In the exercise of that power the Government institutes an action which is commonly referred to as "condemnation proceedings" whereby it acquires title to the property of the individual upon condition that it pay just compensation to the owners of the property.

* * *

While the value is to be fixed as of June 13, 1958, that does not mean that you must necessarily exclude from your consideration all evidence relating to other dates. Our estimates of the value of property are very often influenced and materially affected by our knowledge of the history of the property and the conditions which, it is probable, will exist in the near future.

Generally speaking, you have a right, in fixing the value as of that date, to take into consideration all facts and circumstances in evidence which people who are buying and selling lands would take into consideration in private negotiations for the sale of such lands; both the [63] facts and circumstances which would tend to bear down the price, and the facts and circumstances which would tend to stimulate the price.

* * *

The necessity of the Government acquiring the property must not be taken into consideration, nor must any unwillingness to sell the property by the owners be taken into consideration in your deliberations. The owners of the property are entitled

to receive as compensation for the taking by the Government, the value of the property for the use for which it is most valuable, and by this is meant the market value for that use, not its value to the owner for such or any other particular use, but that price which a reasonably prudent and careful man, having knowledge as to valuations in the locality in question, and who is desirous but not under any necessity of purchasing, would be willing to pay for the property having such uses in view, or, if he were the owner thereof, would be willing to accept as the purchase price of it, he being under no necessity to sell. And while determining the fair, cash value of the property you will properly consider its capability and availability for the different uses to which it is reasonably and practically applied, you will, nevertheless, bear in mind that you are to ascertain and determine the full, fair, cash [64] market value of the property as it existed on June 13, 1958. In determining the fair cash market value of the property sought to be condemned you will not permit yourselves to be influenced by the character of the petitioner as the Government of the United States, and neither will you permit yourselves to be influenced in any way by the character of the defendants, or any unwillingness on their part to part with their property.

* * *

The act of Congress authorizing appropriations for the construction of the Interstate Defense System of Highways, of which the highway to be built

on the property sought to be condemned is a part, provides:

“All agreements between the Secretary of Commerce and the state highway department * * * shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project, without the prior approval of the Secretary. Such agreements shall also contain a clause providing that the State will not permit automotive service stations or other commercial establishments for serving motor vehicle users to be constructed and located on the rights of way of the Interstate System.” [65]

* * *

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public use that it is impossible to formulate an exact rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule, but the general rule is that just compensation to the owner is to be determined by reference to the highest and best use for which the property is reasonably and practically suitable and adaptable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the reasonably near future. The market value of land taken for public use includes its value for any use to which it may reasonably and practically be put, and all of the uses for which it is reasonably and practically adapted, and not merely the condition

in which it is found at the time of the taking, and to which it was applied by the owner at the time. Land, by reason of its location, surroundings, or natural advantages or inherent characteristics, may be peculiarly adapted to some particular use, and all of the circumstances which make up this adaptability are to be taken into consideration in determining the fair market value of the land and just compensation to the owner thereof. [66]

* * *

While the Court's statement of the law of the case must bind you and control you, any opinion or comment of the Judge as to the facts does not bind nor control you. Anything that I may have said or seemed to have said during these instructions or during the course of the trial with relation to the facts in this case, or any witness, is not to be considered as binding or controlling on you, for it is the jury that determines the facts and the weight of the evidence, and the credibility to be given to the different witnesses and to the testimony of the respective witnesses.

* * *

The instructions you have already heard have been expressed in what may be, for the layman, rather formal legal language. However, they are not intended to be mysterious. You are in the same position in arriving at your verdict as a Judge of this Court would be if a jury had been waived. Your verdict should be founded on your judgment, your memory and recollection, your experience, your common sense and your conscience.

You are not bound by the testimony of any wit-

ness as to any matter except as such appeals to your judgment and common sense and you are entitled to view it and to interpret it in the light of your experience. [67]

* * *

Your verdict is to be your best judgment under your solemn oath based on the evidence, and your view of the property, in the case. Of course, you should not diminish fair compensation even one single dollar because you find that the government has need for the property, or because of any favor you might have for the government's action. Likewise, neither should you enhance fair compensation even one single dollar because of any feeling that the government should not have taken the property, or because you believe it would have been better had the landowner been allowed to keep his property. Neither should you increase your verdict even one single dollar because you feel that the government has ample money with which to pay.

* * *

You have heard the witnesses and seen the exhibits offered in evidence. You have listened to the arguments of counsel and to the instructions of the Court, and soon you will retire to your jury room. You may take with you for such further examination as you may desire, the exhibits that have been admitted in the case, for consideration by you, and you will consider your verdict. [68]

You are instructed, however, that in arriving at any verdict, you are not permitted to add together different amounts representing the respective views

of different jurors and to divide the total by twelve or by some other figure intended to represent the number of jurors, or ideas represented. Any such would be a quotient verdict and would be contrary to law and contrary to your oath. You are, of course, to give serious consideration to each other's views and reasoning in an honest endeavor to reach common agreement upon the verdict, but such common agreement is to be based upon the final beliefs of each juror, and must not be arrived at by the mechanical device of addition and division which constitutes a quotient verdict.

* * *

The other jurors will be excused from the Court room for a moment while I take up a matter of law with counsel, and you will be called right back.

* * *

It will require the concurrence of the entire jury in order to return a verdict. When you retire to your jury room to deliberate, you will select one of your number as foreman who will sign your verdict for you when you have agreed upon one, and who will represent you as your spokesman in the further conduct of this case in Court.

* * *

There has been prepared, for your convenience a form of verdict, and in the blank therein you should insert what you determine to be fair and just compensation for the landowner.

I will excuse you for a moment or two while I take up a matter of law with counsel.

The bailiffs may be sworn.

The alternate jurors, Mr. Bowen and Mr. George, may be excused until next Tuesday, September 30th, at 10:00 a.m.

* * *

(In the absence of the jury.)

The Court: Any exceptions to the instructions, Mr. District Attorney?

Mr. Whittier: The Government has an exception to the following instruction given: The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property known in law as a right of access and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.

This instruction does not apply to the new highway, but just to the old Highway 30.

The Government will request an instruction and we believe the correct law to be: That discontinuance of a public street or its appropriation to other purposes than that of a highway does not constitute a taking of the property of the users, other than abutting owners, unless special damages are shown other than an inconvenience different in degree only from that suffered by the general public.

The Court: Let me have that. Now, Mr. Jepsen, do you have any exceptions to the instructions given?

EXCEPTIONS TO THE INSTRUCTIONS

Mr. Jeppesen: Yes, your Honor, we take exception to the instruction which states: "The fact that the relocation of the Interstate Highway may deprive the defendants here of profits incidental to their business is not an element of damages. The Government in the exercise of its lawful Governmental powers retains power to relocate highways within the State." We object to the first sentence of that instruction and we feel that the correct instruction given by the Court on the right of abutting owners having a peculiar right not common to other citizens. In connection with that last instruction we feel that the last sentence where the Court said, "This instruction does not apply to the new highway, but just to the old highway," may be somewhat misleading to the jury and we object to that one sentence.

The Court: You may recall the jury.

(The following in the presence of the jury):

Mr. Jeppesen: I have some other objections, if the Court please.

The Court: Just a moment, you may take the jury out again.

(The following in the absence of the jury):

Mr. Jeppesen: We feel that the Court's instructions do not properly cover the following points, and we offer these instructions which we think should be given and they properly state the Defendants' theory of the case. First, instruction

number 1 offered by the defendant: "The measure of damages to be awarded to the defendants Steve Winn and Edith Winn in this case is the difference in market value of their property before the taking of any of it by the State as compared to its market value after the contemplated new highway is built."

We offer Defendants' instruction number 2 which we feel correctly states the law and should be given: "The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him a means of getting to and from his property, known in law as a right of access and is a right which cannot be taken or materially interfered with by the State without payment of just compensation."

The Court: I am sure I gave that instruction.

Mr. Jeppesen: That's right, your Honor, I failed to check it. Now, Defendants' requested instruction number 3: "You are instructed that all the loss or damage to the defendants occurring by the taking must be assessed or determined in one proceeding. The damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of the defendants' property and from the use to which the State proposes to put the property taken."

Defendants' requested instruction number 4 we feel states the law and should be given: "In determining market value of the Defendants' prop-

erty as of the date of the issuance of Summons in this case, and in determining market value of the property remaining after the taking, you must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the State has been taken and put to the use proposed by the Plaintiff, and you should determine the difference between the value before the taking and the value after the taking, and your judgment should be for the Defendant in the amount of that difference.

Last, the Defendants offer instruction number 5, we think it should be given as a proper statement of the law: "In determining the value of Defendants' property after the taking of a part of it by the State, you may consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have on the market value of the Defendants' remaining property."

The Court: The exceptions will all be denied. You may recall the jury.

Now, ladies and gentlemen of the jury, you may retire to consider your verdict.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughn, hereby certify that I am the official Court Reporter who took the testimony and

proceedings given and had in and about the trial of the above-entitled cause, in shorthand, and thereafter transcribed the same into longhand (typing) and

I further certify that the foregoing transcript consisting of pages numbered to 75 is a true and correct transcript of the testimony given and the proceedings had in said matter.

In Witness Whereof, I have hereunto set my hand this 16th day of January, 1959.

/s/ G. C. VAUGHN,
Reporter.

[Endorsed]: Filed January 16, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Request for Taking.
3. Declaration of Taking.
4. Motion for Order for Delivery of Possession.

5. Order for Delivery of Possession.
6. Judgment on Declaration of Taking.
7. Notice with Marshal's return thereon.
8. Demurrer of Steve Winn and Edith Winn.
9. Minutes of the Court of September 9, 1958.
10. Notice of Withdrawal of Attorney for Steve Winn, et al.
11. Motion of Orvill O. Mabe, et ux., to Intervene as Defendants.
12. Minutes of the Court of September 24, 1958.
13. Minutes of the Court of September 25, 1958.
14. Verdict.
15. Judgment on Tract No. 5 (Steve Winn and Edith Winn).
16. Stipulation and Petition for Entry of Judgment—Tract No. 10.
17. Judgment—Tract No. 10 (O. E. Cannon, et al.).
18. Notice of Appeal of Steve Winn, et ux.
19. Undertaking on Appeal.
20. Designation of Record on Appeal.
21. Order Extending Time for Docketing Record on Appeal.
22. Reporter's Transcript.
23. Exhibits Numbered 1, 2, 3 and 4.

In witness whereof I have hereunto set my hand and affixed the seal of this court, this 16th day of January, 1959.

[Seal]

ED M. BRYAN,
Clerk,

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 16340. United States Court of Appeals for the Ninth Circuit. Steve Winn and Edith Winn, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: January 19, 1959.

Docketed: January 29, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
Ninth Circuit

No. 16340

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

29.27 ACRES OF LAND, More or Less in the
County of Elmore, State of Idaho, STEVE
WINN and EDITH WINN, Husband and
Wife, et al.,

Defendants-Appellants

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

1. The Court erred in advising and instructing the jury that the diminution in value of appellants' business property by reason of the destruction of business access to appellants' property could not be considered by the jury in fixing amounts of damage suffered by appellants.

2. The Court erred in advising and instructing the jury that appellants' damages must be limited to the market value of the land taken by appellee without regard to any diminution in value of appellants' remaining property by reason of the taking of a part of it by appellee.

3. The Court erred in advising the jury that because appellee is not obligated to build a new access way to appellants' property, appellee is not obligated to pay for appellants' access way taken or evidence of fair market value of appellants' destroyed by it.

4. The Court erred in excluding the appellants' property immediately before the taking and of the diminution in fair market value of said property by reason of the taking of it by appellee.

5. The Court erred in excluding appellant Steve Winn's testimony as to the effect on value of his business property by reason of the taking or destruction of access to said business property.

6. The Court erred in excluding evidence as to present use of appellants' property abutting on the North side of the present highway.

7. The Court erred in excluding evidence of the highest and the best use of appellants' property on both sides of the present highway.

8. The Court erred in instructing the jury that the rule that an abutting owner's right of access cannot be taken or materially interfered with in eminent domain proceedings without payment of just compensation does not apply to the new highway, for construction of which appellants' land and right of access was taken.

9. The Court erred in refusing to instruct the jury that the measure of damages to be awarded to the defendants Steve Winn and Edith Winn is the

difference in market value of their property before the taking of any of it by the appellee as compared to the market value of said property after the contemplated new highway is built.

10. The Court erred in refusing to instruct the jury that all the loss or damage to the appellants reasonably occurring by the taking must be assessed in one proceeding and that the damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of defendants' property and from the use to which the State proposes to put the property taken.

11. The Court erred in refusing to instruct the jury that in determining market value of the defendants' (appellants') property as of the date of the issuance of summons and in determining market value of the property remaining after the taking, the jury must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the plaintiff (appellee) has been taken and put to the use proposed by the plaintiff and that they should determine the difference between the value before and the value after the taking in determining the amount of their verdict.

12. The Court erred in refusing to instruct the jury that in determining the value of defendants'

(appellants') property after the taking of a part of it by plaintiff (appellee) the jury should consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have upon the market value of defendants' (appellants') remaining property.

CLEMONS, SKILES & GREEN,
JEPPESEN & JEPPESEN,

By /s/ CARL JEPPESEN,

Attorneys for Appellants.

Recepit of copy acknowledged.

[Endorsed]: Filed January 29, 1959.

IN THE
United States
Court of Appeals
For the Ninth Circuit

STEVE WINN and EDITH WINN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Idaho,
Southern Division.*

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FILED

JUL 12 1959

PAUL P. O'BRYEN, CLERK

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IN THE
United States
Court of Appeals
For the Ninth Circuit

STEVE WINN and EDITH WINN,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Idaho,
Southern Division.*

I

STATEMENT OF JURISDICTION

This action was brought by the United States of America for the taking of certain property belonging to appellant under the power of eminent domain and to determine just compensation to appellants. Jurisdiction is alleged in the Complaint to be based upon the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. 257) the Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258 (a)) and the

Federal Aid Highway Act of 1956 approved June 29, 1956 (70 Stat. 374), authorizing the acquisition of land or interest in land (including control of access thereto) for construction, reconstruction or improvements of the national system of interstate and defense highways. The appeal is authorized under 28 U.S.C.A. 1291, and Rule 73, Federal Rules of Civil Procedure.

II

STATEMENT OF THE CASE

Appellant is the owner of 67 acres of desert land (66) approximately 8 miles (65) west of Mountain Home, Idaho. The present route of U.S. Highway 30 runs through the appellants' property and appellants have built a building adjoining the present highway on the south used as a rock shop where the appellants cut and polish rocks and sell them and other trinkets and souvenirs to the public. Appellants have a considerable investment in the property (68) and have made their livelihood operating the rock shop for the past five years (66). The present action was brought by appellee to condemn approximately 2.30 acres out of the northeast corner of appellant's land for the purpose of constructing a new interstate limited access highway (marked x on exhibit 1; see Transcript page 29). The new highway is roughly 2000 feet northeast of the present highway, and cuts off the present highway to the west of appellant's property in such a manner that there is no access to the new high-

way for 14 miles over a dirt road (31) to the west and only a probable access to the new highway 4.5 miles to the east (33-34). Appellants' property will have a frontage of 650 feet along the new highway but there will be no access permitted from appellants' property to the new highway (30) and plaintiff will be left stranded on the desert (66-70) with only an unkept dirt road leading to and from the rock shop toward Boise some 40 miles away or to Mountain Home about 8 miles away over the old highway a distance of approximately 4.8 miles where he may be able to get onto the new highway and proceed into Mountain Home.

The case was tried to a jury but the appellants were not permitted to put on any evidence concerning the value of appellants' entire property before the taking and the value of the remainder after the taking and the application of the property taken to the uses proposed by appellee. The trial court repeatedly advised the jury when ruling on admissability of evidence (55; 63) that the jury could consider only the value of the small acreage taken by the plaintiff-appellee and that they could not award defendants-appellants' anything for diminution in value of their remaining property by reason of the taking of the small tract and the cutting off of access to appellants' remaining property (44, 47, 50, 55, 63, 65).

In giving his formal instructions to the jury the trial court instructed the jury that they were to award the fair cash value "for the property

taken" (78) but the court had repeatedly advised the jury while ruling on evidence that plaintiff was taking only 2.30 acres of bare land and that they could award damages for nothing more (55, 63).

The jury returned a verdict of \$100.00 (21) that being the amount appellee's witness fixed as the fair market value of the 2.30 acres of land actually taken (41). This is an appeal from the verdict and judgment entered thereon.

SPECIFICATIONS OF ERROR

1. The court erred in advising the jury that the diminution in value of appellants' business property by reason of the destruction of business access to appellants' property could not be considered by the jury in fixing amount of damage suffered by appellants. (44, 47, 50)

2. The court erred in advising and instructing the jury that appellants' damages must be limited to the market value of the land taken by appellee without regard to any diminution in value of appellants' remaining property by reason of the taking of a part of it by appellee. (50, 55-56)

3. The court erred in advising the jury that because appellee is not obligated to build a new access way to appellants' property, appellee is not obligated to pay for appellants' access way taken or destroyed by it. (55, 59, 63)

4. The court erred in excluding the appellants' evidence of the fair market value of appellants' property immediately before the taking and the

fair market value of the property remaining after the taking of part of it by appellee on appellees objection that such evidence was incompetent, irrelevant and immaterial and not a proper basis upon which an award could be made. (63)

5. The court erred in excluding appellant Steve Winn's testimony concerning value of his property after access to it is disrupted by the construction of the new highway on appellee's objection that such testimony was immaterial, that no foundation laid for it and that it was beyond the scope of the trial. (68-69)

Likewise it was error to sustain the objection on grounds of immateriality to the question propounded to Steve Winn, appellant, "In your opinion would you be able to continue business after the highway is built and your access is destroyed?" (68)

6. The court erred in sustaining the objection made by appellee to the question as to the market value of the Winn property as it was just prior to June 13, 1958 (the day of taking) asked of Emmett Newel, real estate appraiser (55). The objection being "that it covers issues beyond the scope of this trial." (55)

7. The court also erred in granting the motion to strike (63) the witness Newel's testimony of market value of appellants' property prior to the taking (58) and the market value of the property remaining after the taking by reason of disruption of ac-

cess to his property (bottom of p 59), said motion to strike being on the ground "that the opinion of this witness . . . being incompetent, irrelevant and immaterial and not being a proper basis upon which an award of damage can be made." (63)

8. The court erred in sustaining the objection (70) to the offer of proof by the witness Steve Winn, appellant as to the value of his business property after the disruption of access thereto by construction of the new highway (69). The objection being that the offered evidence was immaterial, no foundation and that it was far beyond the scope of the trial. (69)

9. The court erred in instructing the jury that the rule that an abutting owner's right of access cannot be taken or materially interfered with in eminent domain proceedings without payment of just compensation does not apply to the new highway, for construction of which appellants' land and right of access was taken. (74)

10. The court erred in refusing to instruct the jury that the measure of damages to be awarded to the defendants Steve Winn and Edith Winn is the difference in market value of their property before the taking of any of it by the appellee as compared to the market value of said property after the contemplated new highway is built. (Requested Instruction No. 1, p 16)

11. The court erred in refusing to instruct the jury that all the loss or damage to the appellants

reasonably occurring by the taking must be assessed in one proceeding and that the damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of defendants' property and from the use to which the State purposes to put the property taken. (Requested Instruction No. 2, p 16)

12. The court erred in refusing to instruct the jury that in determining market value of the defendants' (appellants') property as of the date of the issuance of summons and in determining market value of the property remaining after the taking, the jury must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the plaintiff (appellee) has been taken and put to the use proposed by the plaintiff and that they should determine the difference between the value before and the value after the taking in determining the amount of their verdict. (Requested Instruction No. 4, p 17)

13. The Court erred in refusing to instruct the jury that in determining the value of defendants' (appellants') property after the taking of a part of it by plaintiff (appellee) the jury should consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have upon the market value of defendants' (appellants') remaining property. (Requested Instruction No. 5 p 17)

IV

ARGUMENT

It is well established law both in the State and Federal Courts that where only a part of a tract of land is taken in the exercise of the power of eminent domain the owner is entitled to recover not only for the part taken but also for the injuries to the residue of the property caused by the taking of part of it and the application of the part taken to the use proposed by the taker.

United States v. Grizzard, 219 U.S. 180, 55 L. Ed. 165, 31 S. Ct. 162; Stevenson Brick Company v. United States ex rel Tennessee Valley Authority (C.C.A. Ala.) 110 F (2d) 360; Puget Sound Power and Light Company v. City of Puyallup (C.C.A. Wash) 51 F (2d) 688; City of Lewiston v. Brinton, 41 Ida. 317, 239 P. 738.

It was therefore error for the Court to sustain the objections to the evidence offered by appellants to show the damage to appellants' remaining property and the effect of taking of his right of business access from the rock shop to the highway (43, 55, 63, 65, 68, 69-70, 71) and it was likewise error to refuse appellants' requested instruction on the true measure of damages (appellants' requested instruction No. 1, 2, 3, 4 and 5, pages 16 and 17).

It was likewise prejudicial error for the Court in the presence of the jury to make the following erroneous statement of the law:

"So as to make this clear to you I will say

that the amount of damage that will be allowed will be the value of this tract of land that is being taken *without regard to the fact that the freeway is being built*. In other words, the Court cannot allow you any damages because the road is being built farther away from the defendant's property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he had sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the Government to build an access road from the highway to his property. So the only thing I can submit to this jury is the value of this tract of land cut off from this place, what damage it does to the place, this small tract from the outside corner. I think I have made that clear.” (56) (emphasis added)

Apparently the Court was acting under the misconception that because appellee cannot be compelled to permit appellants' access from the new highway to his shop that appellee is not liable for destruction of the business access presently enjoyed by appellants. (55, 59, 63) The Court considered

the 2.30 acres taken as though it was an area entirely removed from appellants' remaining property (47) and refused to permit the jury to consider that the manner in which appellee intended to use the property taken would greatly depreciate the value of appellants' remaining property (46-47, 50, 84, 86). One of appellee's witnesses repeatedly referred to the "unity of use rule" as a justification for his disregard of the value of appellants' rock shop (44) and the Court seems to have adopted that witness's theory. As we understand the unity of use doctrine it is simply that if one of separate tracts of land is taken which is not put to the same use as the tracts not taken the remaining tracts cannot be considered *as one parcel* in determining the amount of damages to the land not taken (*Atkison, T. and S. F. Ry. Company v. Southern Pacific Company* (Cal. App.) 57 P (2d) 575, 583. In other words, if, for example, the appellants' rock shop had been taken, appellants would not thereby be entitled to treat the entire 67 acres owned by them as commercial property in determining the damages to the remainder unless it could be shown that the entire 67 acres was used as an integral part of the rock shop (*Stevenson Brick Company v. United States, ex rel Tennessee Valley authority* (C.C.A. Ala.) 110 F (2d) 360.) Certainly the unity of use rule does not mean that because the 2.30 acres of land being taken was used by appellants for a different purpose than the rock shop that the appellants are not entitled to any sever-

ance damage to the property remaining. The unity of use doctrine has no application to the facts of this case.

The law recognizes the necessity for payment of compensation for all property and property rights taken.

“For the purposes of these cases it is immaterial whether the Government actually took the leaseholds of the tenants in addition to taking the temporary use of the fee or only destroyed the tenant’s right of occupancy. If any property is taken compensation is required.”

—United States v. Petty Motor Company, 327 U.S. 372, 90 L. Ed. 729.

The case of the United States v. Grizzard, 219 U.S. 180, 55 L. Ed. 165, 31 S. Ct. 162 is a case quite similar in many respects to the case at bar. In that case the owners of a farm brought action to recover for damages because of a flooding of part of their farm and destruction of access to the remaining part.

The plaintiff’s farm lay on Bates Creek, a tributary of the Kentucky River. For the purpose of improving the navigation of that stream the Government erected a series of locks and dams. As a consequence, the waters of Bates Creek were backed up to such an extent as to flood $7\frac{1}{2}$ acres of the Grizzard farm. The flooding also cut off the access of the farm to the County road; the road having been flooded by the dams and locks. The trial court

allowed damages both for the 7½ acres of land actually taken and also for the loss of access from the County road to the farm. The Government appealed, not questioning respondent's right to damages for the 7½ acres of land taken, but contending that no damages could be allowed for loss of access. On an appeal to the Supreme Court of the United States the Court stated:

“The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole, by flooding—a manner of appropriating which has made the village market, church, and school so inconvenient of access as to add some three miles of travel by an unimproved and roundabout County road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.

“The constitutional limitation upon the power of eminent domain possessed by the United States is that ‘private property shall not be taken for public use without just compensation.’ The just compensation thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking

of a part of a partial, or single tract of land shall be measured by the loss resulting to him from the appropriation. If, as the Court below found, the flooding and taking of a part of the plaintiff's farm has depreciated the usefulness and value of the remainder, the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains.

“That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was \$1,500.00 when the value of the entire place before the taking was \$3,000.00. A judgment for a less sum will not be that ‘just compensation’ to which the defendants are entitled. The case is not different in legal consequences from what it would have been if a railway had been constructed across one lawn, cutting the owner off from his road and outbuildings, etc. *To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice.*” (emphasis added)

The question then is whether appellants had property or property rights other than the 2.30 acres of land which were taken by appellee in the condemnation suit.

This question is answered by the case of *United States v. Grizzard*, *supra*. For here as in that case a small acreage of land was taken and the manner to which the use of the property taken was applied greatly interfered with, if not destroyed, the owners' and the public's access to the property remaining after the taking, and as in that case we can say:

"To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken and the use to which it was put, would be a travesty upon justice."

That one having property abutting on a highway has a property right distinct from that of the general public in his free access to the abutting street is now firmly established in the law of Idaho:

"***There is testimony that the new highway when constructed could, in the vicinity of appellant's plant, only be entered at certain points. Convenience of access to a highway, formerly enjoyed by appellant, and impaired by reason of the new construction, could be considered by the jury with other testimony

in fixing the amount of damages sustained. 29 C.J.S., Eminent Domain, Sec. 163. p 1033” —State v. Dunclick, Inc. 77 Ida. 45, 286 P (2d) 1112

“Our review of Idaho’s constitution, statutes and decisions clearly shows that the power of Eminent Domain extends to every kind of property taken for public use, including the right of access to public streets, such being an estate or interest in and appurtenant to real property; and since such right of access constitutes an interest in, by virtue of being an easement appurtenant to, a larger parcel, the court, jury or referee must ascertain and assess the damages which will accrue to the portion not sought to be condemned by reason of the severance of the portion—the right of access—sought to be condemned, and the construction of the improvement. I.C. Sec. 7-711.

“We therefore hold that the appellants’ allegedly destroyed right of business access to their business property, if such be proven, constituted a taking of their property, whether or not accompanied by a taking of physical property, and constituted an element of damage, as does also any element of alleged taking of their physical property, which must be ascertained and assessed in accordance with the legislative mandate of I.C. Sec. 7-711.”

—Hughes v. State, —Ida—, 329 P (2d) 397

The new Federal rule 71 A of the Federal rules

of Civil Procedure effective August 1, 1951 established a uniform procedure in Eminent Domain cases in the Federal Courts but the rule requires the Federal Court to determine what constitutes a property interest for which compensation must be made by reference to local law. *United States v. Smoot Sand & Gravel Corporation* (C.A. 4th) 248 F (2d) 822.

See also *United States v. 247 Acres of land* (D.C. Pa.) 104 F. Supp. 938 where it is said:

“This Court in condemnation proceedings, must necessarily be guided by the practice and proceedings existing at the time in like cases in the Courts of the State in which the condemnation was affected. Federal rules of Civ. Proc. rule 71 A, 28 U.S.C.A.”

Even prior to the adoption of rule 71 A of the rules of civil procedure the Supreme Court of the United States had held that:

“The meaning of ‘property’ as used in the fifth Amendment, prohibiting the taking of property without payment of just compensation is a ‘Federal question’ but it will normally obtain its content by reference to local law.”
—*United States v. Causby*, 66 S. Ct. 1062, 328 U.S. 256, 90 L. Ed. 1206.

As a matter of fact the Supreme Court of the United States and most State Courts which have considered the question have held that the right of

ingress and egress to and from property abutting on a public street or highway is a valuable property right which cannot be taken or materially impaired in an eminent domain proceeding without payment of just compensation therefor. In addition to the case of *United States v. Grizzard*, 219 U.S. 180, 55 L. Ed. 165 and the Supreme Court of Idaho cases quoted earlier in this brief we refer the Court to the following cases in point:

Chicago v. Taylor, 125 U.S. 161, 31 L. Ed. 638, 8 S. Ct. 820, was a case in which Taylor brought an action to recover for damages to his property by construction of a viaduct on a street abutting on his property. The plaintiff's property consisted of a lot used as a coal yard and there was evidence that the construction of the viaduct greatly obstructed and in some points practically cut off access onto the coal yard from the street and that it was necessary to approach the coal yard from Lumber Street at the far end of the lot.

Judgment was for the plaintiff and on appeal the Supreme Court of the United States affirmed the decision and approved the following instruction given by the trial court.

"The real question is, has the value of this property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal yard, or for any purpose for which it has heretofore been used, but that would not be material if it can be rented or sold at as good

a price for other purposes, except that if the proof satisfies you that any of the particular business which has been heretofore carried on there and for which it was improved, have been impaired in value, or are not worth as much after his viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged the plaintiff would be entitled to recover for such damage to the improvements—that is to say, this lot being improved for a special purpose, if the proof satisfies you that it can no longer be rented or used for that purpose and that thereby these improvements have been lost or impaired in value, then the impairment to the value of these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and included in his damage.”

The United States Supreme Court then reviewed the many Illinois decisions under the Illinois constitutional provision for “payment” of compensation for taking or damaging of property by the State and held that the rule announced in *Chicago & W. I. R. Company v. Ayres*, 106 Illinois 518 as follows, was the rule that must be applied:

“It is needless to say our decisions have not been harmonious on this question but in the case of *Rigney v. Chicago* 102 Illinois 64 there was a full review of the decisions of our

Courts, as well as the Courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using improvement that is public in character—that it does not require that the damage shall be caused by trespass, or an actual physical invasion of the owner's real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question.”

The Supreme Court of the United States then went on to say:

“Our attention has not been called to nor are we aware of any subsequent decision of the State Court giving the Constitution of 1870 an interpretation different from that indicated in *Rigney v. Chicago* and *Chicago and W.I.R. Company v. Ayres*. We concur in that interpretation. The use of the word “damage” in the clause provided for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the State Court.”

The case of *Department of Public Works v. Wolf*

(Ill.) 111 N E (2) 322 ~~N E (2d) 322~~, stated the rule as follows:

“The right of access, ingress and egress condemned by this petition are valuable property rights and cannot be taken away or materially impaired without just compensation. (Citing cases) This rule applies not only in Illinois but is generally recognized to be the law throughout the United States. 39 C.J.S. Highway Section 141, page 1081. Moreover the Freeway’s Act in the Section under which this proceeding is brought, Ill. Rev. Stat. 1951 Chapter 121, par. 336, specifically recognizes an abutting property owner right of access, ingres or egress as property rights which may be extinguished only by purchase or condemnation. It thus recognizes the right as being of value, and that the taking thereof must be compensated.

We do not hold, of course, that there may never be circumstances which would justify a jury in finding that particular easement or without value. But such a verdict must be based upon admissable evidence and proper instructions.”

In the case of *Re Appropriation of Easement* (Ohio App.) 112 N E (2d) 411 it is stated:

“It is fundamental that the owner of land possesses an easement of access to the abutting highway at any and all points included within

his frontage on such highway until such easement is extinguished by proper legal process. When such easement is to be extinguished, the owner is entitled to reasonable compensation, just as he is when land is actually taken. While the convenience of through or vehicular traffic and the safety of travelers along the highway merits substantial consideration, the serving of these purposes cannot be dignified to the extent of defeating the rights of the landowner without his being compensated. Ease and facility of access constitutes valuable property rights for which the owner is entitled to be adequately compensated. While the interest of the general public are to be considered as dominant, it does not follow that such circumstances can operate to deny a substantial right of the property owner. The principle is recognized by legislative provision and holdings of the Court. Section 1178-21, General Code. The duty of fully protecting the rights of the property owner in the instance where a limited access highway is created is emphasized in *Burnquist, Atty. Gen. v. Cook*, 220 Minn. 48, 19 N W (2d) 394."

It is said in the case of *Brown v. Board of Supervisors* (Cal.) 57 P. 82 at 83:

"The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights, he is entitled to

compensation. The right is peculiar and individual to the abutting owner, differing from the right of passing to and fro on the street, which he enjoys in common with the public and any infringement thereof gives him a right of action. (Cases omitted). The right which the abutting owner has to the use of the street fronting upon his lot is defined to be an easement therein for the purposes of ingress and egress which attaches to the lot and in which he has a right of property as fully as that which he has in the lot itself, and any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself within the meaning of the constitutional provision, for which he is entitled to compensation . . .

“The question of damage to the right of access does not depend on the location of the obstruction strictly on the owners property line, or upon total destruction of the owners means of access into the street proper.

“It is the opinion of this court that in every case involving an abutting owner’s right in the street fronting his property the questions are whether or not his property has suffered a damage peculiar to itself over and above or different from that suffered by the public generally; what constitutes a damage peculiar to the property itself; and what the amount of

compensation therefor shall be; we hold that all of these questions of fact to be ascertained by the jury or the trial court."

In *Bacich v. Board of Control of California* (Cal) 144 P (2d) 818, the California Supreme Court makes an extensive analysis of the cases concerning the taking in eminent domain proceedings of the right of access of an abutting owner. That was a case involving the construction of the approach to the San Francisco Bay Bridge which resulted in lowering of Harrison Street in San Francisco by approximately 50 feet leaving as the only access to appellant's property an almost perpendicular flight of steps. A demurrer to plaintiff's Complaint was sustained but reversed on appeal. The Court stating at page 823 of the Pacific Report:

"It has long been recognized in this State and elsewhere that an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. That right has been described as an easement of ingress and egress to and from his property or, generally, the right of access over the street to and from his property, and compensation must be given for an impairment. We are not inclined to question or disturb that rule (citing many cases) The precise origin

of that property right is somewhat obscure but it may be said generally to have arisen by court decisions declaring that such right existed and recognizing it. See Am. Jur. Eminent Domain, Section 181; 41 Yale Law Journal 221. For that reason in the determination of the extent and character of that right most of the cases rely, without discussion, upon precedents which fit, or are analogous to the circumstances present in the case before the Court.

“Manifestly, the addition to the Eminent Domain clause in Constitutions in most states, including California, of ‘or damage’ to the word ‘taken’ indicates an intent to extend that policy to embrace additional situations. On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased costs. (citing cases) However, it is said that in spite of that so called policy ‘the Courts cannot ignore the sound and settled principles of law safeguarding the rights and property of individuals. (This improvement) may be of great convenience to the public generally, but the properties of abutting owners ought not to be sacrificed in order to secure it’; and, quoting from Sedgewick on Constitutional Law: ‘The tendency under our system is too often to sacrifice the individual to the community;

and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. ****' *Liddick v City of Council Bluffs, Iowa*, 5 N W. (2d) 361, 372, 382."

Idaho like California requires that payment be made not only for property "taken" but also for property "damaged." See Section 7-711, Idaho Code.

Boxberger v. State Highway Commission (Colo.) 251 P (2d) 920 discussed the question of how to determine damages for loss of access and there the Court said:

'It would seem difficult to establish the true or market value of access rights since they are not a commodity dealt in on a buying and selling market; however, the right of ingress and egress to and from a person's property adds or detracts from the property value and it would seem that the true value of such rights could only be found in the difference between the value of the land and its use for any and all kinds of purposes before the disturbance or destruction of such rights, and the value of the land minus any access or disturbed or inconvenient access to the highway.'

In *Stock v. Cox*, (Conn.) 6 A. (2d) 346 the Court said:

"The rule of damages for a taking in the

usual case of this nature is 'the difference between the market value of the whole tract as it lay before the taking and the market value of what remains of it thereafter and after the completion of the public improvement. (Citing cases). The use to be made of the land taken is necessarily a factor to be considered in the application of this rule. The finding is that upon completion of the parkway the plaintiff will be deprived of the access across the land taken between his north and south tracts which he had previously enjoyed, and that insofar as his south tract is concerned the condemnation will prevent his right of access to an existing public highway. This destruction of the plaintiff's right of access to his south tract constitutes a taking of it in the constitutional sense. 18 Am. Jur. 789, Sec. 158; *United States v. Welch*, 217 U.S. 333, 338, 30 S. Ct. 527, 54 L. Ed. 787, 28 LRA (NS) 485, 18 Am. Jur. 814, Sec. 183, and 756, Sec. 132. This taking goes beyond an award for consequential damages to the plaintiff's remaining property by the taking of the center segment, which could be awarded on an appeal from the assessment of damages therefor, pursuant to the rule in the *Gaylord* case above recited. It constitutes rather a confiscation of the plaintiff's remaining land, for the direct taking of which the commissioner has assessed no damages. Against this the plaintiff is entitled to injunctive relief."

The measure of damages under the facts of this case, as is apparent from the foregoing cases, is the difference between the market value of appellants' entire tract of land as it lay before the taking and the market value of what remains after the taking and after completion of the new highway. Thus it was essential to appellants' case that the nature of the proposed public improvement and its effect on the market value of appellants' remaining property be considered by the jury under proper instructions of the Court. *Chicago v. Taylor* 125 U.S. 161, 31 L. Ed. 638, 8 S. Ct. 820; *United States v. Petty Motor Company*, 327 U.S. 372, 90 L. Ed. 729.

The trial court in the case at bar repeatedly advised the jury during the course of the trial in effect that the Government (appellee) was liable to appellants only for the 2.30 acres taken:

"The Court: This is a very simple matter to clear up—*not taking into consideration any highway construction there or anything of that nature, and taking the whole property, what would you say the value of the property was lessened by the taking of this small tract of land, and you have already answered that as One Hundred Dollars. I don't see there is anything more for him to answer.*" (emphasis added) (Transcript p. 50-51)

"The Court: So as to make this clear to you I will say that the amount of damage that will be allowed will be the value of this tract of

land that is being taken *without regard to the fact that the freeway is being built*. In other words, the Court cannot allow you any damages because the road is being built further away from the defendants' property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he has sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the Government to build an access road from the highway to his property. *So the only thing I can submit to this jury is the value of this tract of land cut off from this place*, what damage it does to the place, this small tract from the outside corner. I think I have made that clear." (transcript p. 55-56) (emphasis added)

See also the Court's remarks at pages 43, 44, 47, 48, 59, 63 and 68 of the transcript.

And although appellants requested proper instructions on the measure of damages, the Court failed to advise the jury of any measure of damages to be applied in the case. The only instruction given on the measure of damages was the one re-

ported on the bottom of page 77 and continuing on page 78 of the transcript. There the jury was told in effect that the owner should receive "as compensation for the taking the value of the property for the use for which it is most valuable." But the Court then referred to the property as "the property sought to be condemned" which the Court had repeatedly told the jury during the course of trial consisted of 2.30 acres of bare land, even though the Complaint alleges (4) that appellees were intending to take "fee simple title *** together with all existing, future, or potential common law or statutory abutters' rights or easements of access to, from, and between said land and the abutting land of all parties having interest in said land." The Court gave appellants requested instruction No. 2 (16) but added a paragraph to it (74) which, to say the least, left the instruction so ambiguous as to be meaningless.

Thus the jury retired to deliberate the case with no evidence of the value of appellants' property prior to the time of the taking and no evidence of the value of the property after the taking and the construction of the highway as proposed by appellee. Moreover they had no clear formal instructions on the measure of damages. All the jury had to guide them as to the law was the Court's remarks during the trial that the only thing for the jury to consider "is the value of his tract of land cut off from this place" (55) and that "so as to make this clear to you I will say that the amount of damage that will

be allowed will be the value of this tract of land that is being taken without regard to the fact that the freeway is being built." (55) etc.

The only evidence of value permitted to stand in the record was the testimony of appellee's appraiser that the appellants' only damage was the loss of the 2.30 acres of sagebrush land valued at \$100.00 (41) and the Court strongly indicated to the jury that he was in accord with that appraisal (50-51). It is no wonder then that the jury returned a verdict for \$100.00 and gave no consideration to the destruction of appellants' business by reason of the taking away of the business access to his property.

We submit that the case should be reversed and a new trial ordered, whereat the jury are permitted to hear evidence of the difference in value of appellants' property before the taking of the 2.30 acres and after the taking of said small tract and the cutting off of access from the highway to appellant's remaining property by construction of the highway, and are permitted to determine the case under proper instructions covering all issues involved.

Respectfully Submitted

CLEMONS, SKILES & GREEN
JEPPESEN & JEPPESEN

By_____

Karl Jeppesen
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Residing at Boise, Idaho

APPENDIX I.

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Plf's No 2	36	36	36	
Plf's No 3	38	39	39	
Plf's No 4	39	39	39	

No. 16340

In the United States Court of Appeals
for the Ninth Circuit

STEVE WINN AND EDITH WINN, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16340

STEVE WINN AND EDITH WINN, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, SOUTHERN DIVISION*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal filed October 27, 1958 (R. 25), from a judgment (R. 22-24) filed on September 29, 1958, awarding just compensation for property condemned by the United States. The jurisdiction of the district court was invoked by the United States under the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257; the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258(a) to (e); and the "Federal-Aid Highway Act of 1956," approved June 29, 1956, 70 Stat.

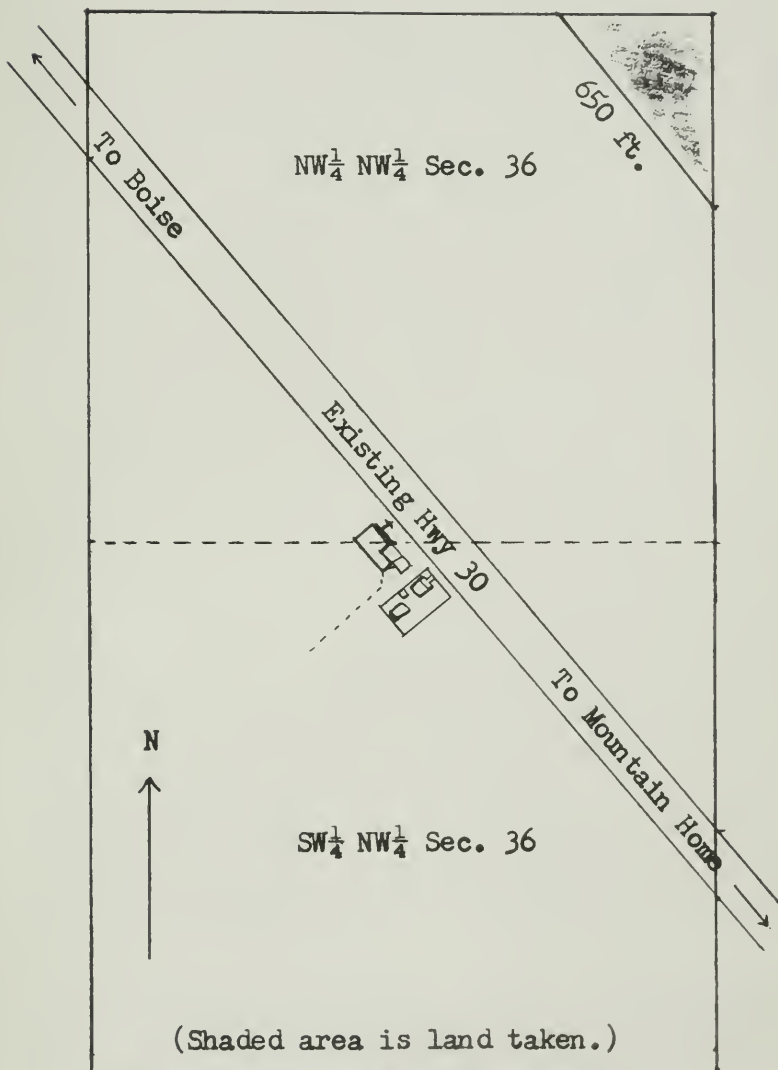
374, which authorizes the acquisition of land or interests in land, including the control of access thereto from adjoining land, required for the construction, reconstruction, or improvement of any section of the National System of Interstate and Defense Highways (R. 3-4). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether one from whose grazing land a small corner is condemned for a limited access highway may, under the guise of severance damage, compensation for loss of access or otherwise, recover for diversion of traffic from the existing highway through his land and the consequent loss of business to commercial establishments on that highway.
2. Whether such landowner is entitled to compensation for being denied direct access to that new highway and, if so,
3. Whether any sufficient offer of proof of damage because of loss of such access was made.

STATEMENT

On June 13, 1958, the United States instituted proceedings to condemn 29.27 acres of land, 2.38 acres of which belonged to appellants, for Idaho Highway Project I-3022(7), a portion of the National System of Interstate and Defense Highways running between Mountain Home and Boise, Idaho (R. 3-10). The 2.38 acres taken from appellants constituted the northeast corner of appellants' holding, which consisted of one-half of a quarter section (see diagram on opposite page.) Appellants' tract is bisected diagonally from



Appellants own W $\frac{1}{2}$, NW $\frac{1}{4}$, Sec. 36,
Twp. 2S., R. 5E., B.M.

northwest to southeast by U. S. Highway 30, and in the middle of their tract, on U. S. 30, the appellants conduct a business known as the Rock Shop (R. 66). There is also at that point a service station known as the Crater Station, concerning which no claim is made, presumably because appellants do not operate it (R. 57). Some 14 acres in the heart of the tract either are devoted to commercial uses (R. 40-41, 42 *et seq.*) or are under contract of sale¹ (R. 45, 55). The property is located eight miles out of Mountain Home, which means it is some 35 miles from Boise (R. 65). On September 24 and 25, 1958, a jury trial was held to determine just compensation for this parcel, commencing with a view of the premises (R. 18-21).

The first witness for the Government, Richard A. Maule, a civil engineer with the Idaho Department of Highways, described the new Interstate Highway and how much of the appellants' land would be involved (R. 29-30). On cross-examination it was brought out that the appellants would have 650 feet of frontage on the Interstate but that they would not have access to it (R. 30). Appellants will have to travel 4.8 miles toward Mountain Home or some eight miles toward Boise to reach the closest interchanges by which they can get onto the Interstate (R. 31-32). After the completion of the Interstate, the appellants

¹ Mr. and Mrs. O. O. Mabe, the purchasers in this sale, moved to intervene in this suit as parties defendant on the grounds that they were contract purchasers of a part of the larger portion from which Tract No. 5 was taken and that they had a financial interest in and ownership of the right of access to, from and between the Interstate Highway and the property being purchased under contract of sale. This motion was denied without prejudice in open court on September 24, 1958, at the trial of this suit (R. 18).

will no longer be able to use U.S. 30 to reach Boise, because U.S. 30 is to be obliterated at a point between appellants' land and Boise where it and the Interstate intersect. However, U. S. 30 is to remain unchanged as it now runs through appellants' property and they will be able to use it to travel the 4.8 miles toward Mountain Home to gain access to the Interstate (R. 32-34).

Vernon C. Turner, the Government's second witness, testified concerning the market value of the property taken. He stated that the highest and best use of the land taken was dry land grazing, the use being made of it at the time of the taking. He further testified that the parcel taken was worth \$100, and that the value of the whole tract had been reduced from \$3,150 to \$3,050. He had based these figures on his determination that the land was worth \$50 per acre. In his testimony on the whole tract, Turner was quite careful to exclude the 13 or 14 improved acres in the middle of the tract (R. 40-41), and on cross-examination (R. 42-51) he made it quite clear that he did not consider this improved acreage as part of the same unit from which the 2.38 acres had been taken. Appellants' counsel made repeated efforts to get Turner to testify on the value of the commercial acreage and on the value of the appellants' land including the commercial acreage, but Turner refused to do so, not having appraised this acreage. Turner explained why he had not appraised this 14 acres as follows (R. 43):

It was my feeling that through the unity of use rule the fourteen acres where the improvements are located had no bearing on the other

land which are [sic] designated as dry grazing and not dependent on each other.

Shortly after that, he explained why he had excluded 14 acres from the whole tract instead of just the two or three acres on which appellants' buildings sit (R. 45):

I believe there is 12 point some odd acres, 12.67 acres which is under a contract for sale and when I say fourteen acres that's a round figure assuming that the difference between the fourteen and the 12.67 would be the adequate ground that the other improvements owned by Mr. Winn do set upon.

Finally, when appellants' counsel tried to get Turner to consider the effect of loss of access to the property, Turner interrupted him with this answer (R. 50):

—Mr. Jeppesen, by the rules by which an appraiser is governed there are certain things that you take into consideration and there are certain things that you do not take into consideration, until such time that I am instructed that circuitous travel is compensable I cannot consider it.

Appellants' first witness was an appraiser, Emmett Newel. When appellants' counsel asked Newel's opinion of the market value of the Winn property just prior to the taking, the United States objected to the question on the grounds that it went far beyond the scope of the trial. Appellants' counsel argued that to fix severance damages it is proper to inquire

into the before and after values of the property. The trial court ruled on the objection as follows (R. 55-56):

So as to make this clear to you I will say that the amount of damage that will be allowed will be the value of this tract of land that is being taken without regard to the fact that the freeway is being built. In other words, the Court cannot allow you any damages because the road is being built farther away from the defendant's property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he has sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the government to build an access road from the highway to his property. So the only thing I can submit to the jury is the value of this tract of land cut off from this place, what damage it does to the place, this small tract from the outside corner. I think I have made that clear.

Then appellants' counsel made an offer of proof on what he had hoped to show by Newel's testimony (R. 56-57):

Your Honor, we will offer to prove by this witness if permitted to testify—let me put it this way:

This witness Mr. Emmett Newel, if permitted, would testify that the defendant Winn had approximately 67 acres of land in one contiguous tract divided only by the present highway which runs through the property. There are no fences on either side of the highway except the fence around one building. That the total value of the property as of the date immediately preceding the taking on June 13, 1958, was the sum of \$11,380.00, and the witness will also testify that the land has a principal value as commercial property and a small use for grazing but that it has a potential on both sides of the highway as commercial property. That after the taking, the property as commercial property is valueless, that it has some value as grazing and also future farm land if something develops out there, which is speculative, so that the value after taking, of the entire tract is \$2,400.00 and that the difference between the two values before and after is \$8,980.00.

The trial court concluded from this offer that this opinion must be based on the fact that the new highway is to be constructed some distance from appellants' place and that they would not have access to the new highway (R. 57). Despite the court's ruling and the Government's objection, Newel testified that the before taking value of appellants' land was \$11,380 and that the after taking value was \$2,400 (R. 58-59). On cross-examination (R. 60-63), he testified that he had valued the land actually taken at \$35 an acre and agreed that the total for the 2.38 acres would be somewhere in the neighborhood of \$85. To arrive at his

before taking value for all of appellants' land, he had appraised the buildings and improvements. When asked what damage the taking would cause the buildings, Newel said that it would do no physical damage. When asked if appellants' improvements would have been damaged just as much if the new highway had missed appellants' land entirely, Newel answered that the damage would have been the same. Newel then admitted that his appraisal was based on loss of access, on the fact that after the Interstate is finished no one will drive eight or nine miles to reach appellants' place of business. The court then sustained a motion to strike Newel's opinion because there was no proper foundation for it, and then sustained an objection to an attempt to reintroduce it (R. 64-65).

The last witness was appellant Steve Winn. He testified that people coming from the west, from Boise, would now have to go 4.8 miles past his place of business and then come back in order to reach it. Appellants' counsel tried to get into the record Mr. Winn's opinion of the before and after taking value of his land, but the court sustained the Government's objection to this testimony, though Mr. Winn did say that he thought the property was worth over \$20,000. Then appellants' counsel made another offer of proof, this time stating that he had intended to show that the appellants' business would be rendered valueless because of the disruption of access to it and that the land would thereafter be useful only for grazing and worth only \$2,500. Mr. Winn then testified that he had about \$1,000 invested in signs along U.S. 30, but this testimony was stricken after cross-examination showed that the taking itself had no effect on these signs.

Of the instructions to the jury, only the following two are of concern on this appeal (R. 74):

The fact that the relocation of the Interstate Highway may deprive the defendant here of profits incidental to his business is not an element of damages. The Government in the exercise of its lawful Governmental powers retains power to relocate highways within the State.

* * * * *

The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property, known in law as a right of access, and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.

This instruction does not apply to the new highway, but just to the old highway.

Appellants' counsel objected to both of these instructions and then offered five more, four of which the trial court refused to give and one of which (No. 2) it had already given (R. 84-86). Appellants' requested instruction No. 1 would have made the measure of damages "the difference in market value of their property before the taking of any if it by the State as compared to its market value after the contemplated new highway is built." No. 3 would have instructed the jury that all damages must be assessed in one pro-

ceeding and that the damages must cover all loss reasonably to be anticipated to result from the taking "and from the use to which the State proposes to put the property taken." No. 4 would have charged the jury to "take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the State has been taken and put to the use proposed by the Plaintiff," and then to determine the difference between the before and after values. No. 5 would have told the jury that it could "consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have on the market value of the Defendants' remaining property."

On September 25, 1958, the jury returned a verdict of \$100 (R. 21), for which amount judgment was entered on September 29, 1958.

ARGUMENT

Appellants' specifications of error boil down to the following basic contentions: (1) the trial court should have allowed the jury to consider the effect of the building of the new highway on appellants' business and (2) the trial court should have allowed the jury to consider the damage suffered by appellants because of loss of access. The error of appellants' arguments flows primarily, we believe, from failure to distinguish between the two access problems here presented. When the effect, if any, of the taking upon appellants' existing access to U.S. 30 is considered independent of any damage because appellants are denied direct

access to the Interstate, the correctness of the district court's rulings becomes clear.

I

The Trial Court Properly Refused to Allow the Jury to Consider the Effect of the Building of the New Highway on Appellants' Business

A. Any damage to appellants' business results not from the taking itself but rather from the diversion of traffic to the Interstate Highway, and thus such damage is not compensable:—The appellants never explicitly state that they should be allowed compensation in this suit for damage to their business, but even a cursory examination of the record and argument reveals that it is business loss for which they seek recovery. Of course, an explicit argument asking payment for business loss would be contrary to the well-settled rule that such losses are not compensable in eminent domain actions. *Joslin Co. v. Providence*, 262 U.S. 668, 675 (1923); *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *United States v. Petty Motor Co.*, 327 U.S. 372, 377-378 (1946). So instead of asking the court for damages to their business, appellants ask for damages for loss of business access (discussed in II, A, *infra*, p. 19), or urge that they should have been allowed to show the value of their business property as part of the before value of their property (discussed in I, B, *infra*, p. 17).

The fact is clear that the damage of which appellants complain arises solely from the circumstance that the opening of the new highway will divert the traffic upon which appellants' business relied for customers. This diversion constitutes, we submit, simply frustra-

tion of a business opportunity, which is noncompensable. *Omnia Commercial Co., Inc v. United States*, 261 U.S. 502, 513 (1923); *United States ex rel. T. V. A. v. Powelson*, 319 U.S. 266, 282 (1943). Appellants' situation is no different from that created when the United States acquires a residential area, thereby depriving utilities companies of customers. The utilities companies cannot recover for the resulting loss. *Southern Counties Gas Co. of Cal. v. United States*, 157 F. Supp. 934 (C. Cls. 1958), cert. den. 358 U.S. 815 (1958); *Kellettville Gas Co. v. United States*, 56 F. Supp. 919 (W.D. Pa. 1944). To the same effect are *Fix v. City of Tacoma*, 171 Wash. 196, 17 P.2d 599 (1933), and *Deepe v. United States*, 103 Colo. 294, 86 P.2d 242 (1939), involving, respectively, a water company and a telephone company. Cf. *Public Water Supply District No. 3 v. United States*, 133 C. Cls. 348, 135 F. Supp. 887 (1955). Consideration of the consequences of acceptance of appellants' argument demonstrates its error. We are today embarking on a multi-billion dollar federal thruway program to supplement the various state undertakings to solve the automobile transportation problem which is approaching a crisis. The program has been characterized as a "million dollar a mile" undertaking. That figure would be greatly enlarged if every filling station operator, motel owner or other businessman on the present highways could recover when traffic is diverted because of road improvements. The possibility of loss of customers because of change of highways, depopulation of the area due to federal activities, or otherwise, is merely one of the risks of doing business. The public is not a guarantor of a successful business.

But even if business losses were compensable in eminent domain proceedings, appellants still could not recover their business losses here because they have not resulted from the condemnation. The United States in this action took 2.38 acres of what the evidence shows to be grazing land (R. 39-40) without touching or doing any physical damage to appellants' buildings (R. 60) or signboards (R. 70). Any damage to appellants' business, real and serious though it may be, results not from the condemnation of the corner of their tract of land but from the building of the new Interstate Highway. This fact is demonstrated by appellants' offer of proof of what Mr. Newel's testimony would show and the argument on this offer of proof (R. 56-58), by Mr. Newel's admission on cross-examination that appellants' business improvements would have been damaged just as much if the new highway had missed appellants' property entirely as it is under the present state of facts (R. 61), and by Mr. Winn's testimony that the construction of the highway would take his living away and leave him stranded on the desert even though the taking did no physical damage to the signs or buildings (R. 70-71). It is clear that this factual situation brings this case under the general rule that damages which are the incidental result of lawful government action are consequential and do not constitute a taking for which compensation may be secured under the Fifth Amendment of the Constitution. *Bedford v. United States*, 192 U.S. 217, 225 (1904); *Manigault v. Springs*, 199 U.S. 473, 484 (1905); *Sanguinetti v. United States*, 264 U.S. 146, 149-150 (1924).

Appellants make the argument (Br. 25) that the

Idaho Code "requires that payment be made not only for property 'taken' but also for property 'damaged.' " Such an argument is not relevant in this suit since it is brought under the federal Constitution. That consequential damage is not compensable is clear not only from the cases cited above but from *Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914), which points out that many state constitutions include the language appellants quote from the Idaho Code precisely because the constitutional concept of just compensation does not include consequential damages. That federal condemnation suits are brought under the federal Constitution and federal law cannot be questioned. *United States v. Miller*, 317 U.S. 369, 379 (1943); *United States v. 93.970 Acres of Land*, — U.S. — (June 22, 1959).

Appellants' case with respect to business loss is not basically any different because some of their land has been taken than it would be if none had been taken, for their loss does not result from the use made of appellants' old land but from the whole Interstate Highway project in their area. In other words, the loss results from the use to be made of *other* land in the same project. It has long been settled that no compensation can be included for diminution in value of the remainder of a condemnee's land due to the use of *other* land in the project. *Campbell v. United States*, 266 U.S. 368, 371 (1924); *Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914). Also see *Boyd v. United States*, 222 F. 2d 493, 494 (C. A. 8, 1955); *United States v. Kooperman*, 263 F. 2d 331, 332 (C.A. 2, 1959).

In *United States v. Grizzard*, 219 U.S. 180 (1911),

relied upon by the appellants, it is clear that the court in determining severance damage was concerned with the use being made by the Government of the very land taken from the respective condemnees. The land taken from Grizzard lay between the remaining portion of his farm and his former access road, and the court noted (p. 183) the special injury to the remaining land resulting from the taking:

The damage to the land not appropriated is the obvious consequence of the taking of a part of the whole by flooding—a manner of appropriating which has made the village market, church and school so inconvenient of access as to add some three miles of travel by an unimproved and round-about country road. Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, *injury due to the use to which the part appropriated is to be devoted*. (Emphasis added.)

The distinction between the special damage recoverable and the general damage which is not was spelled out in *Boyd v. United States*, 222 F. 2d 493, 495 (C.A. 8, 1955), as follows:

Appellants therefore could not claim a right to prove or recover for any diminution in value which might be occasioned to their remainder by the fact that it was being made to adjoin an air base generally, of which their 15.7 taken-acres were to constitute merely some slight, incidental

or abstract segment—for example, a vacant border area—having no specifically demonstrative and directly affective utilization or function. Any depreciating injury which would exist to their remainder in such a situation would have to be regarded legally as being simply a consequence from the air base generally and as not being provably a product of their 15.7 taken-acres. And in respect to such a general, depreciating injury only, appellants would, of course, be in no different position of damage than their neighbors, whose farms the air base also adjoined, although none of their land had been appropriated for inclusion therein.

Hence, only as appellants might be able competently to establish—from the plans and scope of the undertaking, the location of and the part intended to be played by their 15.7 taken-acres therein, and other definitive, probative elements in the situation—that their included tract was intended or would be reasonably likely to have some particular utilization in the project, which from its nature and immediacy to their remainder, would make it capable of contributing *a direct and identifiable element of depreciation*, out of the componency of that which otherwise, as a matter of legal certainty, would simply be attributed to the project generally or as a whole, could there exist any basis for such injury or damages to their remainder as appellants here claim that they were denied the right to prove and recover for. (Emphasis added.)

The court went on to cite *West Virginia Pulp & Paper Co. v. United States*, 200 F. 2d 100 (C.A. 4, 1952), as a case illustrating what “might with adequate certainty constitute a direct and identifiable element of depreciation so as to afford a possible basis for proof and recovery.” There gasoline storage tanks had been built on the piece of land taken and the appellate court held that it had been error to refuse to let the landowner produce evidence showing this fact. Appellants have completely failed to show any direct and special damage to them as a result of use of the 2.38 acres taken from them as distinguished from use of the highway as a whole. Cf. *Nunnally v. United States*, 239 F. 2d 521 (C.A. 4, 1956).

B. *The land on which appellants' business is situated is not part of the unit from which land was taken:*—Appellants persistently tried to introduce evidence of the before and after values of their full holding, including the value of their commercial improvements (R. 47-48, 54-59, 64-65, 67-70), and requested that the jury be instructed to consider these before and after values (R. 85). Though subtracting the value of the condemnee's full holding after the taking from its value before the taking is a proper way to arrive at condemnation damages including severance damage, inclusion of the business property in the computation here would violate the basic severance damage rule that severance damages can be awarded only on a tract which was part, with the land severed, of a single unit. *United States v. Honolulu Plantation Co.*, 182 F. 2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820.

The evidence shows (R. 39-40) that the land taken was grazing land, but appellants were trying to show

the reduction of value of their commercial as well as of their grazing land. The fact that the commercial property was not set off from the grazing land by any physical partition, such as a fence or a road (R. 46, 56), does not lend any validity to any claim of unity between the land taken and the commercial property, because "integrated use, not physical contiguity," is the severance damage test. *Baetjer v. United States*, 143 F. 2d 391, 395 (C.A. 1, 1944). Also see *West Virginia Pulp & Paper Co. v. United States*, 200 F. 2d 100 (C.A. 4, 1952). It takes no citation of authority to show that selling souvenirs to tourists and using land for grazing are two different uses. The simple fact of the matter is that there was no unity of use in this case.

Further refutation of any unity of use argument is a fact alluded to (R. 45, 55) but not spelled out in the record, the fact that 12.67 acres in the midst of appellants' holding are under a contract of sale. These 12.67 acres include a cafe and service station and adjoin appellants' commercial improvements. Plainly this tract is not being sold for grazing use; no more is appellants' Rock Shop being used for grazing.

Finally we should point out that the severance damage to appellants' remaining grazing land was taken into consideration by the Government's appraisal witness (R. 40-41). Mr. Turner testified that before the taking appellants' tract was worth \$3,150 and that after the taking it was worth \$3,050. But he was careful to note that he had excluded from these valuations the 14 acres where the commercial improvements are located. On cross-examination, Mr. Turner made it quite clear that he had excluded these 14 acres

from his valuation because he thought that including them would violate the unity of use rule discussed above (R. 43). This exclusion was quite proper. On the other hand, we should note that appellants never tried to introduce before and after values which did not include the value of the commercial property. Consequently, the only proper severance damage evidence before the jury was that given by Mr. Turner.

II

The Trial Court Properly Refused to Allow the Jury to Consider the Damage Claimed by Appellants Because of Loss of Access

The basic reason the trial court was correct in excluding evidence on loss of access and in refusing to instruct the jury to consider loss of access is simply that the taking here had no effect on any existing right of access. We shall consider separately the question of whether appellants' existing access rights have been damaged and the question of whether appellants ever had any access rights to the Interstate Highway.

A. *Any damage to appellants' existing access rights results from the Interstate Highway project as a whole and not from this condemnation and thus is not compensable:*—The same general principles discussed in Point I, A (*supra*, p. 11), are applicable to the actual loss of access of which appellants complain. Any actual loss is an incidental result of a lawful government action and thus not compensable in a condemnation action. And once again we can say that *United States v. Grizzard*, 219 U.S. 180 (1911), relied on so heavily by appellants, is not applicable here because of an essential factual difference between that case and this. In *Grizzard*, the land taken lay between

Grizzard's remaining land and his access road. Here the land taken lay between appellants' remaining land and open desert. There was nothing on the other side of the corner of appellants' land to which they can claim a right of access; they have not been cut off from anything. All this is not to say that destruction of existing access is not compensable. It is. *Cravens v. United States*, 163 F. Supp. 309 (W.D. Ark. 1958). But here the Government has not destroyed appellants' access rights.

The owner of land has a private property right in a highway if the only access to his land is over that highway, *Schiefelbein v. United States*, 124 F. 2d 945, 947 (C.A. 8, 1942); *United States v. Welch*, 217 U.S. 333, 339 (1910), and destruction of this private property right would be a taking for which compensation must be paid. U.S. Highway 30 is the existing access road to appellants' land now just as it always has been. The evidence does not show that access over U.S. 30 has been or will be destroyed either by the taking or by the whole highway project. Since U.S. 30 as it runs through appellants' land is to remain the same (R. 34-35), appellants cannot complain that their access has been destroyed.

Appellants can and do complain that their access to their land has been made less convenient by the building of the Interstate. U.S. 30 is to be obliterated at a point where it and the Interstate intersect, some eight miles toward Boise from appellants' land (R. 32-33). After the Interstate is finished, the most convenient way by which appellants will be able to reach Boise is by going 4.8 miles away from Boise to a point where they can get on to the Interstate and drive back toward Boise (R. 32). There are at least three independent

reasons why no error was committed by the court below in this connection. First, there was no evidence or offer of proof that, putting aside the loss of business, any added inconvenience in getting to Boise, 35 miles away, and other cities in that direction caused any substantial loss in market value of appellants' property. Access to Mountain Home, the nearest populous center, does not appear to have been substantially impaired. While at this particular place the distance to Boise may have been increased, there is no showing that the total result of the project substantially impairs access to that city, having in mind relevant factors such as total distance, speed of travel, reduction of grades, increased safety and other advantages of modern freeways.

A second answer is the legal recognition of the facts we have been discussing in the rule that mere inconvenience of travel is no ground for the award of compensation. *Ralph v. Hazen*, 93 F. 2d 68, 71, 68 App. D.C. 55 (1937). Thus, this Court, in *State of Washington v. United States*, 214 F. 2d 33 (1954), cert. den. 348 U.S. 862, held that mere inconvenience of added distance between particular points in the State resulting from taking of a state highway did not establish necessity for relocation so as to require the United States to pay substantial compensation. It would follow that no vested rights had been taken from individuals required to travel farther.²

A third reason is the fact that any claim arising out of vacation of U.S. 30, some eight miles away, should

² That distance is not the sole criterion is made clear by this Court's statement (214 F. 2d at p. 42) that while an alternative route was longer than that condemned it was "faster, more comfortable and took no longer time."

be presented in proceedings which we assume were had under state law to abandon that state highway. That would, of course, be a separate state matter to which the United States is not a party.³ It has nothing to do with the present action to determine compensation owing for taking the 2.38-acre tract. *Oyster Shell Products Corp v. United States*, 197 F.2d 1022, 1023 (C.A. 5, 1952), cert. den. 344 U.S. 885; *State Road Department of Florida v. United States*, 166 F. 2d 843, 845 (C.A. 5, 1948).

B. Appellants never had any right of access to the Interstate Highway and thus denial of access to the Interstate deprives them of nothing for which they must be paid:—The problem of whether an abutting landowner has any right of access to a new highway is a new one for the federal courts but has been frequently treated by the state courts, as we shall see. Fundamental to the position of the United States in this case is the distinction between a “land-service road” and a “traffic-service road.” A land-service road is “the normal, ordinary road or highway, which is regarded as being intended primarily to enable abutting landowners to have access to the outside world, as distinguished from the limited-access road which is a ‘traffic-service road’ designed primarily to move through traffic.” Annotation, 43 A.L.R. 2d 1072, 1074n. Of the two highways involved in this case, U.S. 30 is a land-service road, the Interstate a traffic-service road.

³ The Interstate Highway Program is primarily a state undertaking with federal financial and other assistance. When requested, the United States may exert its eminent domain power to assist the project. The federal action here was required because of lack of state authority to acquire immediate possession.

There is no doubt that an abutting landowner has a right of access to a land-service highway, though there is some doubt as to the origin of this right. See Wilkie Cunnyngnam, *The Limited-Access Highway from a Lawyer's Viewpoint*, 13 Mo. L. Rev. 19, 31-32 (1948); *Freeways and the Rights of Abutting Owners*, 3 Stanford L. Rev. 298, 299 (1951); Owen Clarke, *The Limited-Access Highway*, 27 Wash. L. Rev. 111, 116 (1952). Plainly the purpose of a land-service road would be frustrated if the owners of the land being served could not get onto it. But an abutting landowner has no right of access to a traffic-service road, for such a road is not built to serve abutting landowners but to facilitate movement of traffic. As it is plain that allowing all abutters access to a road slows traffic and makes travel more dangerous, access to traffic-service roads has been limited so that those roads may better fulfill their purpose.

The only cases in which abutting landowners have been paid for deprivation of right of access to limited-access roads are those in which old land-service roads have been converted into limited-access roads. For example, see *Boxberger v. State Highway Commission*, 126 Colo. 526, 251 P.2d 920 (1953). But where no road previously existed at all, the courts have uniformly held that the abutting landowners had no right of access for which they must be paid. *Schnider v. State*, 38 Cal.2d 439, 241 P.2d 1, 43 A.L.R.2d 1068 (1952); *People v. Thomas*, 108 Cal.App.2d 832, 239 P.2d 914 (1952); *Los Angeles v. Geiger*, 94 Cal.App.2d 180, 210 P.2d 717 (1949); *State, By and Through State Highway Com'n v. Burk*, 200 Ore. 211, 265 P.2d 783 (1954); *State v. Calkins*, 50 Wash.2d 716, 314 P.2d 449 (1957);

Carazalla v. State of Wisconsin, 269 Wis. 593, 71 N.W.2d 276 (1955); *State v. Clevenger*, 365 Mo. 970, 291 S.W.2d 57 (1956); *Smick v. Commonwealth*, 268 S.W.2d 424 (Ky. App. 1954).

The basic reasoning underlying these cases is probably best set forth in 3 Stanford L. Rev. 298, 307-308. In fact, the courts in *Schnider v. State*; *State, By and Through State Highway Com'n. v. Burk*; *State v. Calkins*; and *Carazalla v. State of Wisconsin* all cited this article and the following passage in support of their position. The passage reads:

CONSTRUCTION OF A NEW FREEWAY

Suppose the state buys up a completely new right-of-way for a freeway. Take the clearest case first. *A*'s land abuts against *B*'s land. Assume the public buys up a right-of-way for a freeway from *B*, extending along the boundary of his property with *A*, but leaving a one-foot wide strip of land along the boundary line. Obviously, there is no change in *A*'s legal position. Now, suppose the state took *B*'s land right up to the boundary with *A*. Why should *A*'s rights suddenly change? The freeway was never *intended*, from its inception, to provide land service to *A*. Rather it was intended to be a traffic service road. The result must be that, since *A* never had a right of access across his property line before, and since no such right was even impliedly given to him by the state, he does not now have a right of access across his property line to the freeway.

What of *B*'s rights? Suppose a part of his land along his boundary line with *A* has been taken.

B, of course, will be paid for the land actually taken. But should he also be paid for a right of access to the freeway? Again, a simple consideration of our rationale brings out the answer. The land service road concept is inapplicable. *B* was given no access to the public road. He therefore has acquired no right of access to be taken.

As a final case, consider the situation where the right-of-way purchased runs through *B*'s land. In the case of a normal, unrestricted-access highway, *B* will be paid for the land actually taken and also "severance" damage for the separation of the property. If the highway is to be of limited-access design, with *B* having no right of access, the severance of the two parcels will be more complete. *B* should be, and is, paid for this more complete severance, but this is on the basis of severance damage alone and not on any theory of right of access being denied.

Another analysis of the problem also shows us that it would be error to require the United States to pay for the alleged right of access to the new highway. Requiring this would be but another way of saying that the United States must pay appellants for depriving them of the enhanced value of their land, which enhanced value the United States was creating by building the highway in question. But the United States cannot be required to pay for value it has created in the same project for which the land in question is being condemned. *United States v. Miller*, 317 U.S. 369, 379 (1943).

The absurdity of allowing compensation for depriva-

tion of access to a new limited-access highway was quite clear to the Supreme Court of Oregon in *State, By and Through State Highway Com'n v. Burk, supra*, where it said (265 P.2d at 792) :

Since the statute may be employed, either to extinguish conceded and existing easements in a conventional highway, or to take new land for a non-access highway, *the statutory provision authorizing compensation for rights of access carries with it no implication that an easement of access, which never existed before, is created by filing an action to condemn a non-access highway, and then, eo instanti, extinguished by the bringing of the same action.* The constitution requires compensation for the taking of an easement only if there is an easement to take. If there was none, then the statute which authorizes compensation for such easements does not apply. (Emphasis added.)

This absurdity was also clear to Wilkie Cunnynggham, writing in 13 Mo. L. Rev. 19, 35 (1948) :

In an inquiry into the market value of right-of-access property, the time element is one of the most important factors—"is of the essence." Until the highway is opened to public travel the abutter does not have legal title to any access-right property. The city slicker may have sold the Brooklyn Bridge (which he didn't own) to the gullible stranger; but surely no highway authority would be so gullible as to pay an abutter for access-rights to a new highway which the same highway authority has not yet given to the abutter.

The case before us then is quite clear. Appellants never had any right of access to the Interstate Highway; the United States has given them no right of access by condemning some of their land for use in the Interstate Highway. If appellants had no right of access, the United States has not taken such a right away and owes appellants no compensation for any such right.

C. Appellants have made no offer of proof of damages resulting from loss of access to the new highway:—Even if by some magic appellants were found to have a right of access to the new highway for the construction of which their land was taken, no offer was made to prove damages for loss of that alleged right. As we have emphasized, the only offer of proof was as to damages to the business on old highway U.S. 30.

CONCLUSION

As the United States has paid appellants just compensation for all that has been taken from them, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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